



F4 Course notes

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Syllabus A: Essential Elements Of The Legal System

Syllabus A1. Law And The Legal System

Syllabus A1a) Define law and distinguish types of law.

Types of Law

There's a number of different types of English law:

Law basically though is a system of rules which regulate it's members actions - let's look at Civil and Criminal Law..

1. Civil

Here - it's individuals versus individuals, looking for compensation (not punishment)
Eg. Smith v Clarke

2. Criminal law

Here it's State enforcing the law, looking for punishment
Eg. R v Smith

	CIVIL LAW	CRIMINAL LAW
Who brings action?	Claimant	Prosecution (CPS)
Standard of Proof needed?	Balance of probabilities	Beyond reasonable doubt
Decision made?	Liable/not liable (by a Judge)	Guilty/not guilty (by a Jury)
Aim?	Compensation	Punishment
What remedy is made?	Damages	Prison/Fines

Notice how you need more proof in a criminal case

Explain The Structure And Operation Of The Courts

Criminal Court System

These are the Criminal Courts:

1 **Magistrates Court**

This is where you go if your case is a 'summary case' -this just means the max fine is £5k and max imprisonment is 6 months

The decision is made by the Magistrate

2 **Crown Court**

This is where you would go for an "Indictable Offence" - the decision is made by a jury, and sentence decided by a judge

(some cases are called "either-way" cases eg theft, drugs etc and these could go in either magistrates or county courts)

Where can you appeal to if you lost a Magistrates Court decision?

- 1 Appeal to the **Crown court** (or High court (Divisional court of Queens bench division) for a legal mistake)
- 2 If that fails appeal to the **Court of Appeal**
- 3 If that fails appeal to the **Supreme Court**
- 4 If that fails appeal to the **European Court of Justice**

Where can you appeal to if you lose a Crown court case?

- 1 If that fails appeal to the **Court of Appeal**
- 2 If that fails appeal to the **Supreme Court**
- 3 If that fails appeal to the European **Court of Justice**

Civil Court System

These are the Civil Courts:

- 1 **County Court**
This is for small claims track cases (
- 2 **High Court**
This is for large and/or complex cases
It is also for multi-track cases over £25k

Where can you appeal to if you lose a County or High court case?

- 1 **Court of Appeal**
- 2 If that fails appeal to the **Supreme Court**
You can appeal directly to the Supreme Court from the high court in rare circumstances
- 3 If that fails appeal to the **European Court of Justice**

European Court of Justice

It is the ultimate authority on EC law and is based in Luxembourg

It gives decisions on written questions from an English court - which the English court then applies

It overrules the Supreme Court only in respect of EC law matters

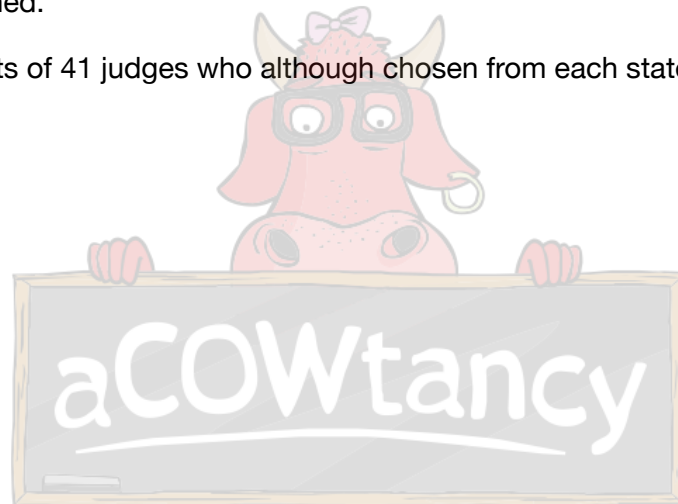
European Court of Human Rights (ECtHR)

The Council of Europe is a body totally separate from the EU

The 41 European countries therein are bound by the European Convention on Human Rights (ECHR)

The ECtHR interprets and applies this convention (ECHR) and its judgements are binding on the States concerned.

The ECtHR consists of 41 judges who although chosen from each state - elected for terms of 6 years.



Syllabus A2. Sources Of Law

Syllabus A2a) Explain what is meant by case law and precedent.

Explain what is meant by case law and precedent

Case Law

Case Law can be split into 2 different Categories

Case law basically means following what judges decided before (in identical circumstances)

- 1 **Common law**
Judges create law by applying something called "Judicial Precedent".
- 2 **Equity law**
Common law had faults (such as not recognising trusts) - so Equity law was created that held fairness as its principle.
It is referred to as a gloss to the common law.

Judicial Precedent

Case law uses something called "stare decisis" (meaning to stand by a decision). Here judges follow the decisions of previous higher court judgements

The hierarchy of courts is as follows

- 1 **Supreme court** – binds all lower courts, but not itself
- 2 **Court of Appeal** – binds all lower courts, and itself
- 3 **High Court** – binds all lower courts, and usually itself
- 4 **Crown/Magistrates/County courts** cannot create precedent

What gets followed by the judges?

- **Ratio decidendi** (meaning the reason for the decision) – this is the binding element of the judgement - so must be followed
- **Obiter dicta** (meaning statements made by the way) – this is not binding, just persuasive

How can Precedents be challenged?

- 1 **Overruling** – A higher court sets aside a lower court ruling. The judiciary are however, reluctant to overrule longstanding authorities
- 2 **Reversing** – A higher court reverses the decision of a lower court -but only the conclusion. Much of the rationale was good and remains good law
- 3 **Distinguishing** – Avoids any precedent as the material facts of two cases are not the same.

Advantages of the application of stare decisis

- (a) Consistency – like for like cases will have the same outcomes
- (b) Flexibility – new cases, new outcomes, new precedents - so law keeps pace with society
- (c) Efficiency – Predictable case outcomes, no unnecessary repetition
- (d) Evidence – there is a vast library of cases to refer to

Dis-advantages of the application of stare decisis

- (a) Uncertainty – there are many ways in which precedents can be avoided (reversal etc)
- (b) Fixity – many outdated laws may remain effective until challenged
- (c) Unconstitutional – the judiciary are not elected
- (d) Evidence (again) – this time the vast library of cases may cause confusion

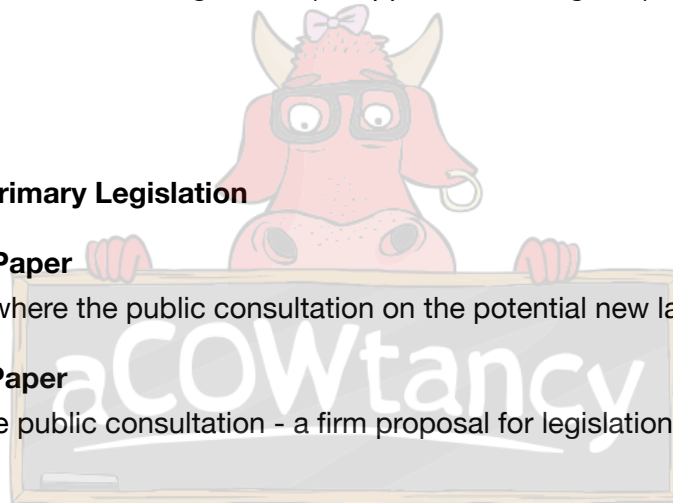
Explain legislation

UK Statute

This is what is called PRIMARY legislation (as opposed to delegated)

Initial Stages of Primary Legislation

- 1 **Green Paper**
This is where the public consultation on the potential new law happens
- 2 **White Paper**
After the public consultation - a firm proposal for legislation is made here



Once proposed it then goes to Parliament

Normally the House of Commons first and the House of Lords next

First Reading	Formal stage to get on Parliament's timetable
Second Reading	Main debate and vote
Committee	Scrutiny by standing committee of cross party MP's
Report stage	Amendments from Committee stage reported on
Third reading	Final debate and vote

It then goes to the House of Lords for the exact same 5 stages

Finally it is then given **Royal Assent**

Types of Primary Legislation

- 1 **Public acts** – Government or private member's bills
- 2 **Private acts** – Powers given to individuals or institutions
- 3 **Enabling acts** – Giving law making abilities to delegated bodies
- 4 **Consolidating legislation** – bringing together existing acts but no amendments made to them
- 5 **Codifying legislation** – bringing together common law and existing statute



Evaluate delegated legislation

Delegated (Secondary Legislation)

If you remember enabling acts can be passed which enable the following to make laws themselves (instead of just Parliament)

Orders In Council	Rare items created by the Privy Council
Statutory Instruments (SI's)	Created by Government Ministers and Departments - basically regulations
Byelaws	Created by Local Government eg Planning laws
Professional regulations	eg ACCA and CIMA making their rules

Advantages of Delegated Legislation

- 1 Saves Parliament time
- 2 More experts can be used
- 3 Quicker to make laws

Disadvantages of Delegated Legislation

- 1 Unelected law makers
- 2 Lack of scrutiny eg no 5 phases like in House of Commons etc
- 3 Too much law created - red tape

Due to these disadvantages Parliament and courts do have some control over delegated legislation as follows:

Parliament

Most new pieces of delegated legislation must be laid before parliament for 40 days, allowing MPs to have their say

The Joint Select Committee reviews all SI's

Parliament may revoke an enabling act

Courts

The courts may declare any piece of delegated legislation 'ultra vires' (beyond capacity) and void if the laws go further than they should



Canons of Statutory Interpretation

Canons of Statutory Interpretation

So we know that parliament makes (or delegates) law - but its the court that has to interpret this law and this section shows the help the court is given in order to do this:

The Canons

These are items that courts can presume (although they can be rebutted)

- Common Law has not been altered
- There's been no back dating of statute
- Crown is not bound
- No strict liability - ie not liable if you didn't mean to commit an offence
- Ejusdem Generis - basically means other such things.. This canon is saying if you have a specific example and then the act says "and other such things" then the things are related to the specific example

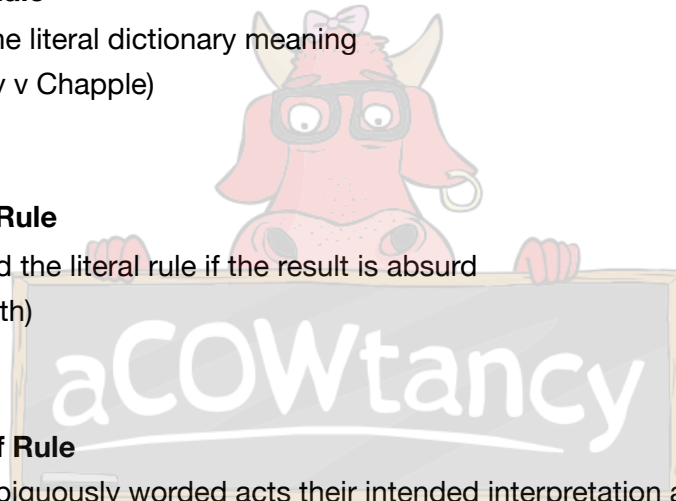
This is shown in the Powell v Kempton Park Case

The Rules of Statutory Interpretation

The Rules of Statutory Interpretation

The rules are:

- 1 **Literal Rule**
Follow the literal dictionary meaning
(Whiteley v Chapple)
- 2 **Golden Rule**
Disregard the literal rule if the result is absurd
(Sigsworth)
- 3 **Mischief Rule**
Give ambiguously worded acts their intended interpretation and hence purpose
(Corkery v Carpenter)



Aids to Statutory Interpretation

Intrinsic Aids for interpretation

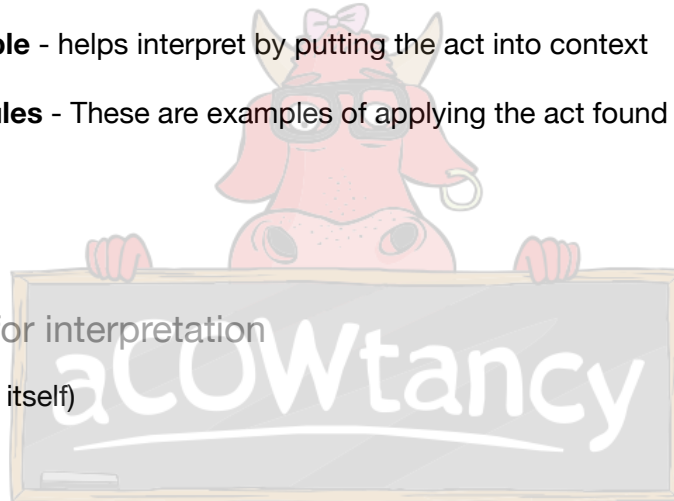
(Inside the Act itself)

- 1 **Title** - helps interpret the main subject matter
- 2 **Preamble** - helps interpret by putting the act into context
- 3 **Schedules** - These are examples of applying the act found at the end of the act

Extrinsic Aids for interpretation

(Outside of the Act itself)

- 1 **The Interpretation Act** - A list of commonly used phrases found in legal acts, giving their definitions
- 2 **Hansard** - The parliamentary journal - records everything said
This might help interpret the act in question eg *Pepper v Hart*
- 3 **A Dictionary** - particularly for when using the literal rule
- 4 **Commission Reports** - Particularly those of the Law Commission



Human Rights Act

It's basic idea

was to prevent governments from persecuting its own citizens

It therefore gave citizens a place to go, outside of their own government

European Convention of Human Rights

This was recognised into English law in 2000 in the form of the Human Rights Act

Human Rights Act

The European Court of Human Rights remains the ultimate authority for this and please remember it is used for prosecuting public authorities (States) only!

How did the HRA affect Interpretation?

And here we mean interpreting old and new statute as well as common law

- All statute and common law must now be seen in light of the HRA
- If theres a conflict between the 2 then a statement of Incompatibility must be made
- This statement must justify why there is an inconsistency (normally due to proportionality) ie The issue is too small for the HRA guidance

Syllabus B: The Law Of Obligations

Syllabus B1. Formation Of Contract

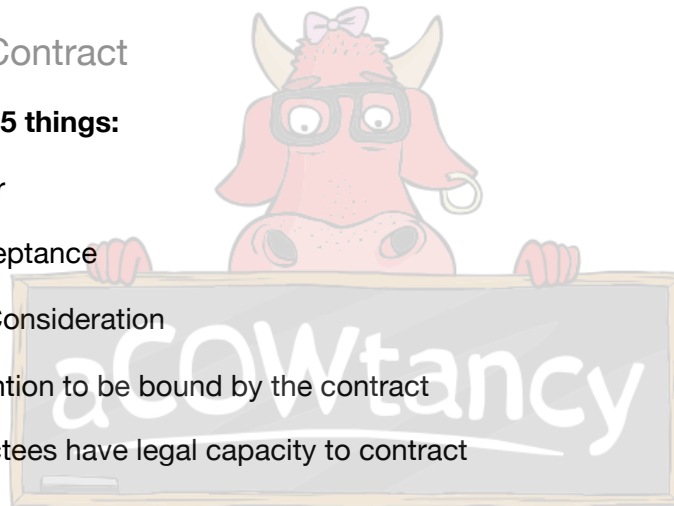
Syllabus B1 a) Analyse the nature of a simple contract.

Analyse The Nature Of A Simple Contract

Definition of a Contract

A contract needs 5 things:

- 1 An Offer
- 2 An Acceptance
- 3 Some Consideration
- 4 An Intention to be bound by the contract
- 5 Contractees have legal capacity to contract



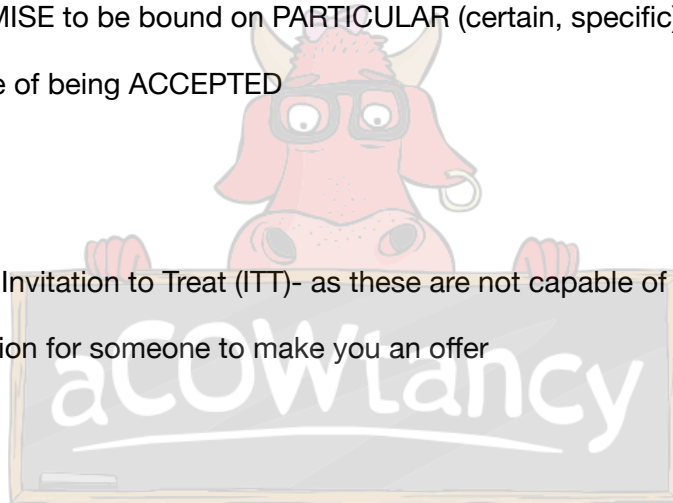
Explain the meaning of an offer and Distinguish it from an invitation to treat

An Offer needs 2 things:

- 1 A PROMISE to be bound on PARTICULAR (certain, specific) terms
- 2 Capable of being ACCEPTED

An offer is NOT an Invitation to Treat (ITT)- as these are not capable of acceptance

An ITT is an invitation for someone to make you an offer



Examples of ITT

- 1 Shop Window Items (Fisher v Bell)
- 2 Goods on a Shop Shelf (Pharmaceutical Society of GB v Boots)
- 3 Precise Public Adverts (Partridge v Crittenden)
- 4 Share Prospectus
- 5 Mail Order Catalogues

The special case Carlill v Carbolic Smoke Ball

Here there's a public newspaper advert stating:

"if you use the ball you won't catch flu!

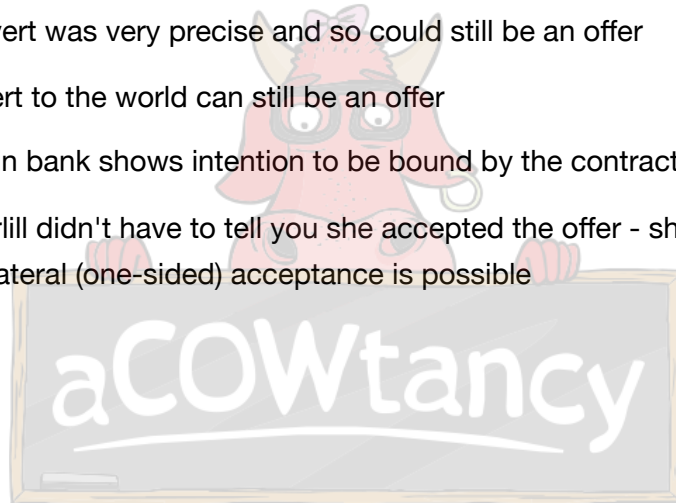
If you use and still catch the flu then you receive £1,000!

So sure are we that you won't catch flu we have put this £1000 in a bank that we cant touch"

Mrs Carlill used it and caught flu - Carbolic smoke ball thought they were ok as it was a public advert and so an ITT and not an offer - however the judge had a different opinion...

here's why...

- The advert was very precise and so could still be an offer
- An advert to the world can still be an offer
- £1,000 in bank shows intention to be bound by the contract
- Mrs Carlill didn't have to tell you she accepted the offer - she did that by using it
(So unilateral (one-sided) acceptance is possible)



Explain The Termination Of An Offer

Ending of an Offer

An offer ends when...

- 1 It is **Rejected** by the offeree (the person you made the offer to)
- 2 The offeree makes a **Counter-Offer** (Hyde v Wrench)
A request for more info though isn't a counter offer (Stevenson v Mclean)
- 3 A simple **Lapse of Time**
This could be EXPRESS eg My offer ends tomorrow or
It could be IMPLIED eg Im selling shares for £10 - these are volatile so a reasonable implied term might be a few days (Ramsgate Hotel v Montefiore)
- 4 It is **Revoked** (no longer an offer) by the person making the offer
That revocation though must be:
Communicated BEFORE acceptance (Routledge v Grant)
Received by Offeree (Byrne v Van Trenhoven)
(Can be communicated via a 3rd party - (Dickenson v Dodds)
Any offer to keep open ("I'll keep this open for you for a week" is invalid unless it's been paid for)
- 5 **Death** - eek!

Explain The Meaning And Consequence Of Acceptance

Acceptance is the unconditional assent to all terms

If it wasn't unconditional and to all terms then it would be a counter offer which would kill the original offer

2 more rules of Acceptance

- 1 The offer must still be open to be accepted
- 2 The acceptance must be by an authorised person

Communication of the Acceptance

The general rule is all acceptances MUST BE communicated Neale v Merrett
via..

- 1 **Words** (written or oral)
- 2 **Conduct** (using the goods, paying for them etc)
Therefore contracts do not need to be signed to be accepted necessarily
Brogden v Metropolitan Railway

Be aware though that acceptance cannot be by silence

i.e "If I don't hear from you - I will presume you've accepted" - is not allowable

Felthouse v Bindley

Exceptions to the General Rule of Communication must be Received:

1 **Unilateral Acceptance** - where possible

2 **Postal Rule**

This means that the offer is accepted when POSTED Adams v Lindsell

- if..

Properly addressed and stamped

Post was expected for acceptance

Not an email (these are considered accepted when in the offers inbox) Entores v

Miles Far Eastern



Explain The Need For Consideration

Consideration is the VALUE in an agreement

It can be goods, service money or a promise of any of these

Both parties must give some form of consideration for a contract to be legal

Therefore you often see people pay £1 for something - just so there is some consideration

There are 3 types of Consideration

Executory and Executed are generally valid

Past is generally not valid

- 1 **Past Consideration** NOT VALID because the law states that the order should be agreement first then consideration, not a past consideration then an agreement
McArdle
However if there was an implied agreement or promise before then that's ok
Lampleigh v Braithwaite
- 2 **Executed Consideration** VALID. This is an action (normally done in return for a promise of money)
- 3 **Executory Consideration** VALID. This is a promise - either to pay or provide goods / services

Explain Adequacy And Sufficiency Of Consideration

Consideration must be Sufficient not Adequate

This means it needs to be something of value to the other person but how much it is - is not the business of the court

Thomas v Thomas

Hence the saying 'Caveat Emptor' - Buyer beware!

Consideration must also be a legal and possible performance

Specific Circumstances

- 1 **Promise to Pay Extra** (for doing existing work)
This extra payment can't be said for if not paid as the work you did was not sufficient - it was just existing work

Stilk v Myrick

Contrast this with doing extra work for extra pay - then you can sue for the payment if not paid as your consideration is sufficient - you did more work

Hartley v Ponsonby

One slight exception is you can do your existing work and still sue for extra agreed money if the deal was mutually beneficial

Williams v Roffey Bros

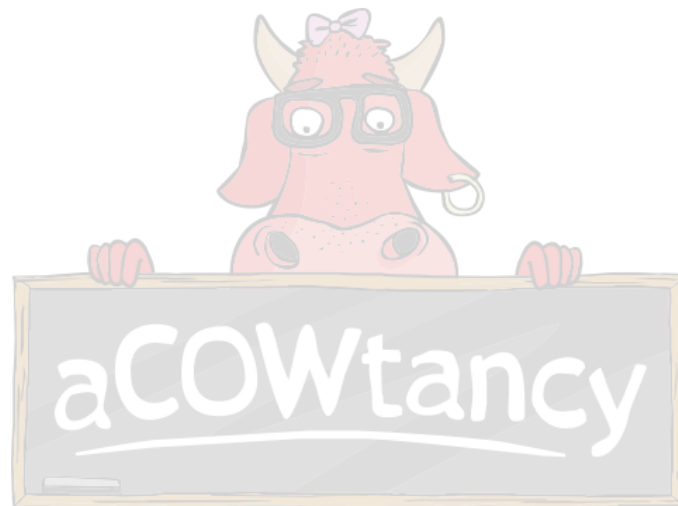
- 2 **Promise to Accept Less**

This is you saying pay me half and I'll forget the rest - and then after receiving half - you asking for the other half. You can actually do this! Because your debtor has not offered any consideration for the reduction by half so the agreement wasn't legal

So how can the debtor add in some consideration and thus be able to rely on this agreement?

- 1) Pay the half Earlier
- 2) Pay the half differently (in-kind)
3. Pay the half at a different location
4. Get a 3rd party to pay the half

Also there is the **Equitable Doctrine of Promissory Estoppel** which says you can rely on the agreement if you relied on the agreement and the creditor knew you were relying on the agreement (to only pay half)



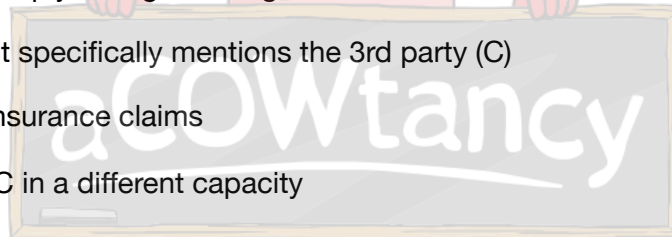
Analyse the Doctrine of Privity

Only someone 'Privy' to the contract can sue

Basically if A does a deal with B for some goods and then B does a deal with C for the same goods then A can't sue C

Exceptions to this general rule

- 1 Contract was assigned (from B to C)
- 2 There's a collateral contract (between A and C)
- 3 The contract (between A and B) was created expressly with a 3rd party in mind (C)
- 4 B was simply acting as an agent for A
- 5 Contract specifically mentions the 3rd party (C)
- 6 Motor Insurance claims
- 7 A sues C in a different capacity



Distinguish the presumptions relating to intention to create legal relations

Intention for Legal Relations

Can be expressly created (written or verbal)

Otherwise it is generally presumed... but see below

Domestic Relations - are they presumed to be legal?

- 1 **Spouses living together** Agreements between these ARE NOT presumed to be legal
- 2 **Spouses Separating** Agreements between these ARE presumed to be legal
- 3 **Agreements between Friends** Agreements between these ARE NOT presumed to be legal
Unless there's a mutuality of Intention
Simpkins v Pays
- 4 **Commercial Agreements** These ARE presumed to be legal
Unless stated that their binding in honour only
Jones v Vernons Pools

Who has NO Legal Capacity to create legal agreements?

These are:

- 1 Minors (16 and under)
Unless for necessities (Valid)
Unless for inheriting interests (Voidable)
- 2 Intoxicated people
- 3 Those without Mental Capacity to do so

Syllabus B2. Content Of Contracts

Syllabus B2a) Distinguish terms from mere representations.

Distinguish Terms From Mere Representations

TERMS are part of the contract

These are so important that they form the reason why the promisee got into the contract

If you breach these - you breach the contract

If you're an expert then your statements are probably terms of the contract

Representations

These are simple inducements to get the other party to join the contract only

Breach these and you haven't breached the contract

These include verbal statements which were later omitted from the written contract

Also if there's a big time gap between the time the statement was made and the contract agreed - then it will probably be treated as a representation only and not a term

Define The Various Contractual Terms

Types of Term

1 **Condition**

This is a fundamental term in the contract

If you breach it - then the other party can:

1) Repudiate (rip up) the contract

2) Claim Damages

The case for this is *Poussard v Spiers*

2 **Warranty**

This isn't fundamental - it's just collateral to the main purpose of the contract

If you breach it - then the other party can:

Claim Damages only

The case for this is *Bettini v Gye*

3 **Innominate**

This means we do not know what sort of term it is

We don't know until the term is breached

If the term is breached and the other party loses the **WHOLE** benefit of the contract
- then it was a condition

If the term is breached and the other party loses **PART** of the benefit of the contract
- then it was a warranty

The case for this is *Cehave v Bremer*

Express and Implied Terms

- 1 An **Express** term is agreed verbally / written before the contract is agreed
- 2 An **Implied** term is not agreed
Instead it is in the contract due to:
 - 1) Statute eg Sale of Goods Act
 - 2) Custom
 - 3) Courts imply a term to give the contract efficacy (The Moorcock case)



Explain The Control Over Terms

Exclusion Clauses

These exempt or restrict the liability 1 party from a breach of contract

As this seems unfair - the courts don't like them

So therefore for one to be allowed it has to pass 3 tests:

Incorporated Correctly?

Constructed Properly?

Reasonable?(B2B contracts)

Fair? (B2C contracts)

Let's look at these in detail..

1 **Incorporated Correctly?**

This basically means BEFORE any agreement is made

NB. If something is signed (even though not read) - it is presumed you've read it

- So a notice board with an exclusion clause has to be there at the time of the agreement
The case for this is Olley v Marlborough Court Hotels
- If a ticket has an exclusion clause on the other side of it - then the ticket has to be shown before agreement
The case for this is Chappelton v Barry
- Verbal statements override any written exclusion clauses
The case for this is Curtis v Chemical Cleaning

2 **Constructed Properly**

This means clearly worded

- Ambiguity in wording will go against the person relying on the exclusion clause
- This is called the Contra Proferentum Rule
The case for this is Houghton v Trafalgar Insurance

3 **Reasonable? - Business to Business Contracts**

This is from UCTA 77

Exclusion clauses on death and personal injury are always ignored by courts

To see if other exclusion clauses are reasonable - courts look at:

- Relative Bargaining Strengths of the 2 businesses
- Any inducements (eg discounts) to allow for an exclusion clause
- Did both parties know about the clause?
- Are the goods bespoke?

4 **Fair? - Business to Consumer contracts**

This is from CRA 2015

Exclusion clauses on death and legal rights are always ignored by courts

To see if other exclusion clauses are fair - courts look at:

- Significant differences in each others' obligations?
- Prominent and simply worded clause?
- Any disproportionate compensation to be paid?
- Opportunity for the consumer to read the clause?
- Can the business unilaterally change the terms and price?

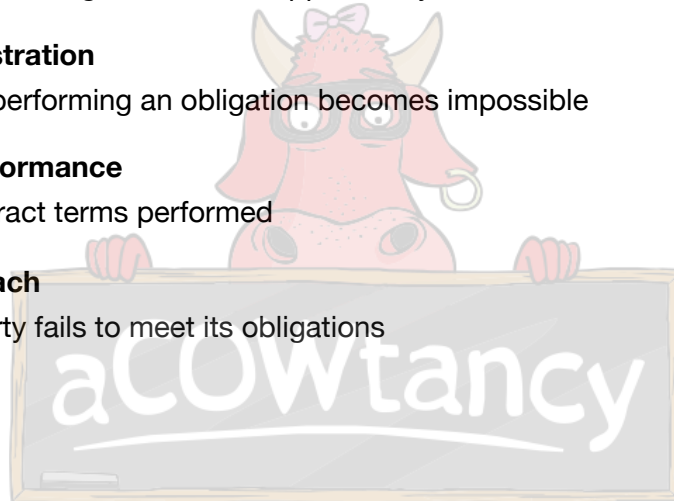
Syllabus B3. Breach Of Contract And Remedies

Syllabus B3a) Explain the ways in which a contract may be discharged.

Explain The Ways In Which A Contract May Be Discharged

Contracts Can Be Discharged in 4 ways:

- 1 **By Agreement**
Both parties agree and it is supported by consideration
- 2 **By Frustration**
Where performing an obligation becomes impossible
- 3 **By Performance**
All contract terms performed
- 4 **By Breach**
One party fails to meet its obligations



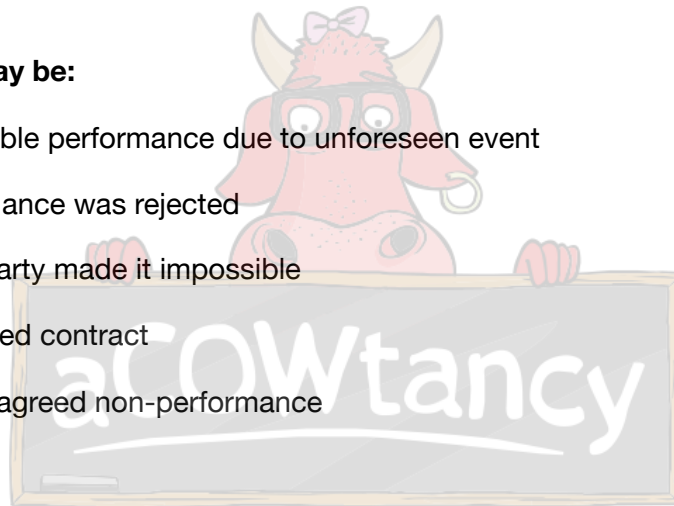
Explain The Meaning And Effect Of Breach Of Contract

A breach is where contractual obligations are NOT performed

However, sometimes a person has a legal excuse not to perform the obligation and so this would not be a breach:

These reasons may be:

- 1 Impossible performance due to unforeseen event
- 2 Performance was rejected
- 3 Other party made it impossible
- 4 Frustrated contract
- 5 Parties agreed non-performance



Effect of a Breach

The breach of a **Condition** as we know means the injured party can repudiate (rip up) the contract - we call this a **repudiator breach**

The injured party can choose to repudiate and claim damages

An Anticipatory Breach

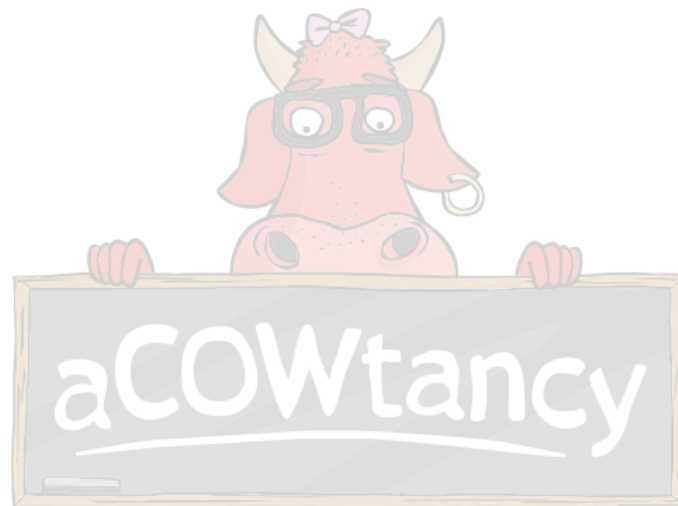
Declaration in advance not to do your side if the bargain - or this can be implied even by their actions

This leaves the injured party with a choice:

- 1 Treat the contract as discharged and sue now
Höchst v De La Tour
- 2 Complete their end of the contract and then sue in full
White & Carter v McGregor

So a straightforward Repudiatory breach tends to happen at the time of performance

The anticipatory breach happens before the performance is due



Explain The Rules Relating To The Award Of Damages

Damages

These are a **common law** remedy

The idea is to put the innocent party in the position it would have been if the contract HAD BEEN performed

In a claim for damages - the amount is quantified by looking at 2 rules:

- 1) The REMOTENESS of the damages
- 2) The MEASURE of the damage

Remoteness of Damage

Hadley v Baxendale

- 1 **Losses must have arisen naturally from the breach**
- 2 **If not, both parties reasonably must have been aware of the probable result of the breach**

So a defendant is only liable if they should reasonably have known of the "special circumstances" causing the unnatural consequence of the breach

Victoria Laundry v Newman Industries

Measure of Damages

Remember this is to put the injured party where they would have been in the contract had been performed

They shouldn't get any more than that from it

Here's things that are considered:

- **Expectation Interest**

This is what is said above - the claimant gets out in the position they would EXPECTED to have been in had the contract been performed

An alternative is **Reliance Interest**

Here the claimant gets put in the position they would have been, had not RELIED on the contract. Basically their asking for their wasted expenses back
Anglia TV v Reed

- **Market Price Rule**

Basically lets say the contract allowed you to buy goods for 10 but the contract failed and now the MARKET price is 12 - then 2 is the damages

- **Non-Financial Loss**

This has been made available for things like mental distress and loss of enjoyment on holidays

- **Mitigation of Loss**

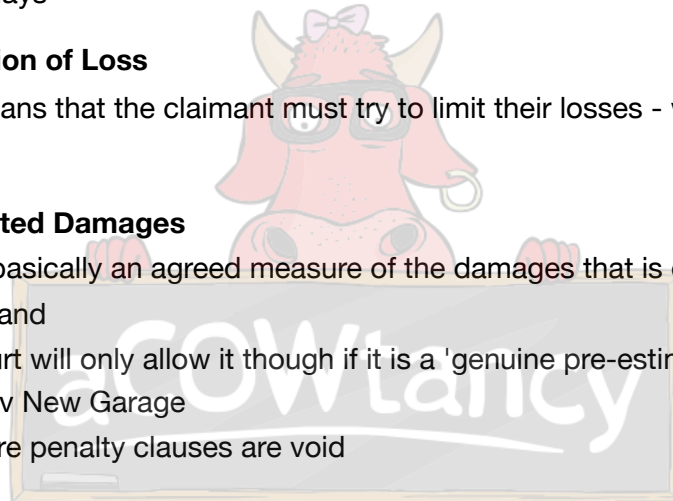
This means that the claimant must try to limit their losses - within reasonable means

- **Liquidated Damages**

This is basically an agreed measure of the damages that is out in the contract beforehand

The court will only allow it though if it is a 'genuine pre-estimate of the likely loss'
Dunlop v New Garage

Therefore penalty clauses are void



Other COMMON LAW remedies

- 1 **Action for the Price**

This is asking for the price in the contract to be the damages. The item bought though must have passed to the buyer and the seller is then suing for the price agreed

- 2 **Quantum Meruit**

This means "how much is it worth" - and the claimant is asking for this value for the work they've done - basically to be put back in the position they would have been had the contract never been made

Because it just puts you back to where you would have been BEFORE the contract (restitutory) - the amount is usually smaller than normal damages (position expected AFTER the contract)

Analyse The Equitable Remedies For Breach Of Contract

Equitable Remedies

These are where the common law remedies aren't enough - they are based on fairness

Therefore, the claimant must also have been fair (innocent)

Types of Equitable Remedy

1 **Specific Performance**

This is the court ordering someone to complete their contractual obligations

It will be made if:

Where minors are involved

1. Court can't ensure the performance over a period of time
2. Where a contract is for personal service (for reasons above)

2 **Injunction**

This is enforcing a contract of NEGATIVE restraints.

So this means stopping people continuing to break their obligations (often personal service)

The case for this is Warner Bros v Nelson

3 **Rescission**

This means putting the parties back to where they were BEFORE the contract

Four conditions must be met:

1. It must be possible to take parties back to their pre-contract conditions
2. This right to rescission was made within a reasonable time
3. The contract hasn't been affirmed by 1 party
4. An innocent 3rd party isn't affected (ie they've now got the goods in the contract)

Syllabus B4. The Law Of Torts And Professional Negligence

Syllabus B4a) Explain the meaning of tort.

Explain The Meaning Of Tort

Definition of Tort - 'a wrongful act against an individual giving rise to a civil claim'

You need to be aware of 2 types of TORT

- 1 Passing Off
- 2 Negligence



Explain The Tort Of 'Passing Off.'

Passing Off

This is the use of a name/logo/description which is trying to make people incorrectly think you're a different entity

For example we have people on the internet using some of our materials and calling themselves acowtancy or accowtancy - when in truth they have nothing to do with us

So the issue is that one party is MISLEADING another



Explain The Tort Of Negligence

The Tort Of Negligence

To be sued for being negligent the claimant must prove:

- 1 You owed a duty of care to the claimant
- 2 You breached that duty of care
- 3 The breach caused harm
- 4 The losses made by the claimant weren't too remote

Now let's look at those things individually - starting with a Duty of Care

A Duty of Care owed?

You are only liable if you owe a duty of care..

Donoghue v Stevenson (1) stated 'you owe a duty of care to anybody who it may be reasonably foreseen will be affected by your negligent acts'

So notice that means NO CONTRACT IS NECESSARY

Caparo v Dickman (2) defined a three stage test would show whether you owe a duty of care or not to someone:

- 1 Was the harm caused reasonably foreseeable?
- 2 Is there sufficient proximity between the defendant and the claimant?
- 3 Would it be fair, just and reasonable to impose a duty of care?

Now let's look at the 2nd item - Did you breach that duty of care?

Breached Your Duty of Care?

Breaching a Duty of Care

To see if you've breached your duty of care - you basically didn't do what a reasonable man would have done

This vague idea is helped by the following rules:

- **You're a Skilled person?** If so then your duty of care is higher
ie a qualified accountant owes a higher duty of care to a client than an unqualified bookkeeper
- **The Likelihood of injury is high?** If so then your duty of care is higher
The higher the likelihood of injury, the more the defendant will have to do to fulfil his duty *Bolton v Stone* (4)
- **The Seriousness of the risk is high?** If so then your duty of care is higher
The more serious the risk, the more the reasonable man would do to mitigate this *Paris v Stepney* (5)
- **The Cost of precautions against breaching is high?** If so then your duty of care is lower (if the cost is greater than the risk involved)
The foreseeable risk must be balanced against the cost of eliminating the danger *Latimer v AEC Ltd*
- **Did you follow common practice?** If so then your chances of being found liable due to breach is lower
Eg an auditor who followed ISAs - it is likely that they would have met their duty of care
- **Was your so called negligent act for a Social Benefit?** If so then your chances of being found liable due to breach is lower
Eg The Police speed in a car to help against a public disturbance

'Res Ipsa Loquitur'

This means "The Facts Speak for Themselves!"

So the nature of the case is so obviously a breach of duty that it is now up to the defendant (not the claimant), in the balance of probabilities, to prove they have not acted negligently

Think of a surgeon who leaves his scalpel inside a patient - so obvious is it that he seems to have breached his duty of care that it is now up to him to prove otherwise

Explain The Meaning Of Causality And Remoteness Of Damage

So far we have said that you can only be liable for Negligence if the following can be proved:

- 1) You owed a duty of care
- 2) You breached that duty
- 3) The breach CAUSED harm
- 4) Losses suffered were NOT too REMOTE

We have looked at 1 and 2 in detail previously so this section looks at 3 and 4

Caused Harm?

Causation can be proved in 2 ways

1 Causation in Fact

The claimant must prove that 'but for' the defendant's actions they would not have suffered the damage *Barnett v Chelsea*

So let's say you go to a doctor because you feel very unwell. He sends you home saying nothing is wrong.

The next day you die! Can the doctor be sued?

Normally yes! As he breached his duty - however it is found out you died from something that would have killed you no matter what the doctor did - so therefore - his actions did not cause the harm

You can't say "BUT FOR the doctor I would have lived"

2 Causation in Law

Here you must prove a direct (no break) in the chain of causation

If an act breaks this direct chain between act and harm it is called a 'novus actus interveniens'.

These are unforeseen events that break the link between the defendant's tort and the eventual harm suffered and include:

1. A natural event – earthquakes, floods fires etc
2. Act of a third party – *Knightly v Johns*
3. Act of the claimant – *McKew v Holland*

Remoteness of the Loss

Finally you must prove that your losses suffered were not too remote

The losses must have been 'reasonably foreseeable' *The Wagon Mound*

How to prove the losses were too remote

1 **Vicarious Liability**

An employee can claim under the law of vicarious liability that it is their employer who is liable for their own negligence not themselves personally - if they were following their Employers instructions *Limpus v London General Omnibus Co*

2 **'Volenti non fit injuria'**

Here there's a known risk eg sustaining a broken nose during a licensed boxing match. So claiming for this is not allowed

For volenti to apply the claimant must have been:

- (1) fully aware of the risks
- (2) voluntarily consented (either expressly or by implication)

3 **Contributory Negligence**

This normally reduces damages only (between 10-75%)

Here the defendant proves that the claimant contributed to their injury in some way
Fitzgerald v Lane & Patel

4 **The Limitation Act 1980**

This Act states that claims in tort should be brought to court within six years from the date of negligence.

For personal injury claims this has been reduced to three years

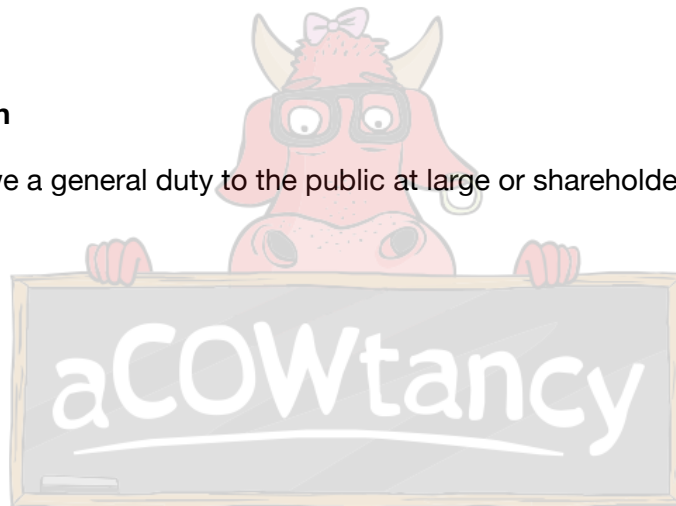
Explain And Analyse The Duty Of Care Of Accountants And Auditors

Accountants and Auditors

Accountants owe a duty of care to their clients and all those whom they know will rely on the accounts

Caparo v Dickman

Auditors do not owe a general duty to the public at large or shareholders increasing their shareholding



Syllabus C: Employment Law

Syllabus C1. Contract Of Employment

Syllabus C1a) Distinguish between employees and the self-employed.

Distinguish Between Employees And The Self-Employed

An Employee has a Contract OF Service

not a contract FOR service

Even so - to see if someone really is an employee and not self employed 3 tests are looked at:

The 3 Tests

1 The Control Test

Basically does the Employer have contractual control how the Employee works

Walker v Crystal Palace FC

A professional footballer is employed because the club tell him when to train, how paid etc

2 The Integration Test

The more integrated you are into the 'Employer's' company - the more likely you are to be an Employee

3 The Multiple (Economic Reality) Test

These are numerous factors which must be taken into account:

You are more likely to be an employee if...

You are provided with tools and equipment

You are appointed by your 'employer' and not by the client

You are paid a salary

You are restricted where and when you can work

You receive holiday and sick pay

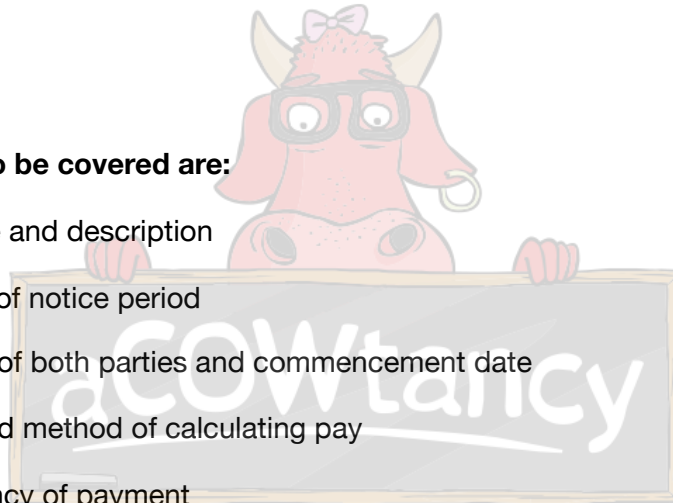
Explain The Nature Of The Contract Of Employment

There are generally no formalities involved in forming the contract of employment

However - the Employment Rights Act (ERA 96) says a written document outlining the main terms of employment is needed within two months of the date of commencement of employment.

The main terms to be covered are:

- 1 Job title and description
- 2 Length of notice period
- 3 Names of both parties and commencement date
- 4 Rate and method of calculating pay
- 5 Frequency of payment
- 6 Holiday pay entitlement and rates
- 7 Hours of work
- 8 Disciplinary Procedures



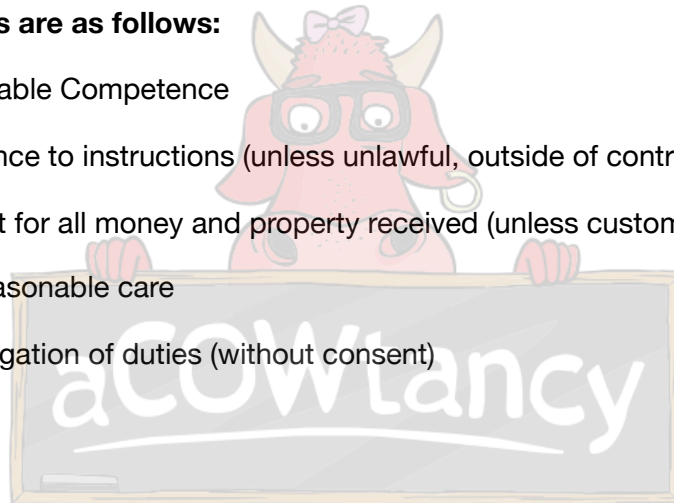
Common Law Duties of the Employee

The Fundamental Duty of Faithful Service

This even includes after the job - if the job involved trade secrets

The Implied duties are as follows:

- 1 Reasonable Competence
- 2 Obedience to instructions (unless unlawful, outside of contract or dangerous)
- 3 Account for all money and property received (unless customary / trivial)
- 4 Take reasonable care
- 5 No delegation of duties (without consent)



Common Law Duties of the Employer

An overriding duty of Mutual Trust and Confidence

So don't call your employee "an intolerable bitch on a Monday Morning" :) (yep that's in a case! - IoW tourist Board v Coombes

Other duties this mutual trust implies for the employer are:

- 1 You must investigate Sexual Harassment Claims
Bracebridge Engineering v Darby
- 2 Pay reasonable remuneration
- 3 Indemnify the employee (for expenses)
- 4 Take care of Health and Safety
- 5 Provide work (or if no work - keep paying as if there was)

NB. There's no duty to PROVIDE a reference

However if you do - reasonable care is needed for its accuracy and fairness

Remedies for breaking these common law duties?

- 1 Treat the contract as discharged and
- 2 Claim for constructive dismissal

Statutory Duties of the Employer

These are in the following areas:

These are in the following areas:

1 Pay and Equality

National minimum wage

Equal treatment regardless of Age, Disability, Sex, Race, Religion, Marriage, Pregnancy

Provide itemised pay statements

2 Time Off Work

The following are in addition to parental leave:

Trade Union duties

Look for other work after being told of redundancy

Public duties eg being a magistrate (though not for jury service)

3 Maternity Rights and Work/Life Balance

A pregnant woman has rights to:

Time off for ante-natal care

Ordinary and additional Maternity leave

Maternity Pay

Return to work after maternity leave

If dismissed - claim for unfair dismissal

4 **Health and Safety**

This includes proper training, safe environment etc

5 **Working Time**

Average working time for a 17 week period (including overtime) should not exceed 48 hours for each 7 day period
(unless the worker agrees in writing)



Syllabus C2. Dismissal And Redundancy

Syllabus C2a) Explain termination of employment by notice.

Explain Termination Of Employment By Notice

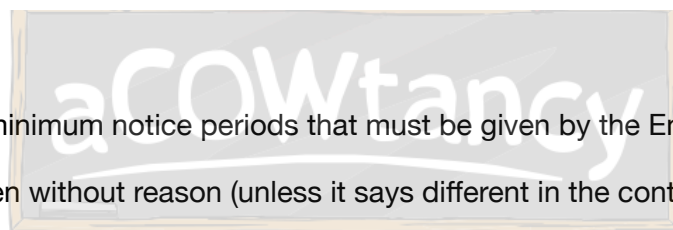
Serving NOTICE is one way of ending Employment

NOTICE is normally just agreed between the Employee and Employer.. however there are MINIMUMS...



Length of Service	Minimum Notice Period
1 month – 2 years	1 week
> 2 years	1 week (for each continuous year worked)
12 years +	Maximum of 12 weeks

So the above are minimum notice periods that must be given by the Employer or Employee
Notice may be given without reason (unless it says different in the contract)



Distinguish Between Summary And Constructive Dismissal

Summary dismissal is when the employee gets 'sacked on the spot'

Here the Employer must show that the employee has made a conditional breach of contract
eg. gross misconduct

If the Employer can't prove that then the employee has been wrongfully, and possibly unfairly, dismissed

Constructive dismissal is when an employee resigns, because of their Employer

The Employee must prove unfair behaviour by the Employer

Case law examples include:

- 1 Changing terms of the contract without consultation
- 2 Making significant changes to the location of work at short notice
- 3 Victimising or harassing staff

With Constructive dismissal the employee can then launch an unfair dismissal claim.

However please note: The employee **MUST** resign otherwise they are deemed to have accepted the employers breach

Explain Wrongful Dismissal

Wrongful dismissal is when the employee has been dismissed without justification

It is a common law claim

Eg. You have been Summarily dismissed (no notice).

You CANNOT claim for wrongful dismissal if you committed:

- Wilful disobedience of a lawful order
- Misconduct, in connection with the business or outside it
- Dishonesty, where the employee is in a position of particular trust
- Incompetence or neglect
- Gross negligence
- Immorality, if likely to affect performance of duties or the reputation of the business
- Drunkenness, in aggravated circumstances such as when driving a vehicle

Remedies for Wrongful Dismissal

These are basically damages

And these damages would be your loss of earnings through having no notice - so the earnings you would have made during the notice period had you been given one

However you must try and mitigate your loss by looking for work elsewhere

Explain Unfair Dismissal

Unfair dismissal is a statutory claim made only by 'qualified' employees

Who is a qualified employee?

- Has at least two years continuous service (unless denied a statutory right)
- Work in the UK
- Not on unofficial strike action when dismissed
- Not in an excluded profession (eg police)

What are FAIR reasons to dismiss someone?

- 1 Employee not capable of doing the job
- 2 Gross Misconduct
- 3 Redundancy
- 4 Statutory restrictions – such as a bus driver who receives a driving ban

What are automatically UNFAIR reasons for dismissal?

- 1 Pregnancy
- 2 A spent (old) conviction
- 3 Official trade union membership
- 4 Just maintaining health and safety
- 5 Enforcing rights to the minimum wage/working time regulations

Where there's doubt as to the fairness of the Employers actions, the tribunal will look at whether the Employer acted REASONABLY

This means:

- (a) Did they apply the correct procedures?
- (b) Did they take all relevant circumstances into consideration?
- (c) What would any reasonable employer have done?



Unfair Dismissal Remedies

There are 3 remedies for Unfair Dismissal

- 1 **Re-Instatement** - being restored to your old position
- 2 **Re-Engagement** - being re-engaged in a different, but similar position
- 3 **Compensation** - See below:

There 3 elements to COMPENSATION

- 1 **Basic Award**

This is linked to age and length of service: (20 years max)

Aged 18 - 21 - 1/2 week's pay (pa of service)

Aged 22 - 40 - 1 week's pay (pa of service)

Aged 41+ - 1 1/2 week's pay (pa of service)

- 2 **Compensatory Award**

This is compensation for loss of wages

It may be awarded in addition to the basic award at the discretion of the tribunal

- 3 **Additional Award**

This is up to 52 weeks' pay - and may be given sex or race discrimination cases

It is seen as a punishment to the Employer

The most common remedy is compensation as who wants to go back to work for an employer who has unfairly dismissed you before?

Explain Redundancy

Redundancy is a fair reason for dismissal

It basically happens when the employer has stopped business (or at least in the place where the employee worked)

Who can claim Redundancy pay?

- Employees
- With 2 years continuous employment

Who can't claim Redundancy pay?

- 1 Those dismissed for misconduct
- 2 Those who unreasonably refused a new contract
- 3 Those who left the claim for six months or more
- 4 Those who left before being made redundant, having been told of redundancy risk

Remedies for Redundancy

These are the same as for the BASIC award for an unfair dismissal claim

Syllabus D: The Formation And Constitution Of Business Organisations

Syllabus D1. Agency Law

Syllabus D1a) Define the role of the agent and give examples of such relationships paying particular regard to partners and company directors.

Role of Agent (Directors and Partners)

An Agent acts on behalf of the Principal

A footballer gets an agent to talk to prospective football clubs for him

So here..

Footballer = Principal

Agent = Agent

Football Club = Third Party

Or, you rent your house out...

You = Principal

Estate Agent = Agent

Tenant = Third Party

Partners and Agency

Here...

Firm = Principal

Partners = Agents

Third Parties (customers, suppliers etc) = Third Party

Under the Partnership Act 1890 all partners are deemed to be agents of the firm and are hence able to bind all co-partners and make them jointly and severally liable for business transactions

Directors and Agency

Here, the board as a WHOLE are agents of the company but NOT individual shareholders so..

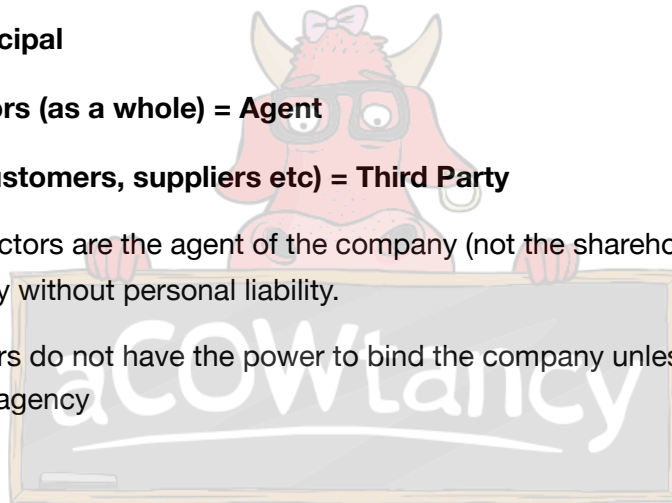
Company = Principal

Board of Directors (as a whole) = Agent

Third Parties (customers, suppliers etc) = Third Party

The board of directors are the agent of the company (not the shareholders) and can therefore bind the company without personal liability.

Individual directors do not have the power to bind the company unless they have derived any of the powers of agency



Explain The Formation Of The Agency Relationship

Agency relationships can be formed in different ways:

- 1 **By Express agreement** – between the Principal and Agent
- 2 **By Ratification** – here a supposed 'agent' acts makes a contract with a 3rd party without the Principal's authority to do so - however the Principal then ratifies (agrees) the contract afterwards
- 3 **By Implication** – here it is the position of the person that implies they are an agent (have the power to bind)
An example is partners in a partnership
- 4 **By Necessity** – here - there's an emergency, the Principal cannot be contacted
So, an 'agent' appoints themselves
They can only bind the principal if it's a genuine emergency and they're acting in the best interests of the Principal
- 5 **By Estoppel** – here a person 'holds themselves out' (pretends) to be a genuine agent
However if the Principal then seems to go along with this then they are 'estopped' from denying the agency relationship existed

Define The Authority Of The Agent

There are different types of authority:

1 **Actual Authority**

This can be

○ **Actual Express**

Here an agent's authority has been agreed with the Principal verbally or in writing

○ **Actual Implied**

Here an agent's authority has been implied by the position held

Authority of this type can be:

1. Customary in the trade circumstances OR
2. Usual in the circumstances

2 **Apparent / Ostensible Authority**

This is created by:

The agent working as if he was an agent previously even though he wasn't actually appointed as an agent (the principal just accepts the arrangement)

Or the principal stops the agent's authority but didn't tell the third party - here the agent can still bind the principal with that 3rd party

Explain The Potential Liability Of Both Principal And Agent

Generally the agent has no liability

This is as long as he performs his duties... which are:

- (a) To perform their duties in line with the instructions of the principal
- (b) To exercise due care and skill
- (c) To act in person
- (d) To be accountable for all transactions
- (e) To avoid a conflict of interests
- (f) Not to make a secret profit
- (g) Not to accept bribes



However, the agent is liable when..

- 1 The agent has signed the contract in their own name (without reference to their role as an agent)
- 2 The agent has admitted liability
- 3 The agent acts outside their authority
- 4 In relation with bills of exchange and deeds
- 5 No principal actually exists

An agent acting with no actual or apparent authority is liable and so has personal responsibility for the contracts he/she entered into

Syllabus D2. Partnerships

Syllabus D2a) Demonstrate a knowledge of the legislation governing the partnership, both unlimited and limited.

Demonstrate A Knowledge Of The Legislation Governing The Partnership, Both Unlimited And Limited

Definition of an Unlimited Partnership

'the relationship that subsists between persons carrying on a business in common with a view to profit'

This means that a partnership is **not a separate legal entity** and

Each partner has **full personal liability** for the partnership debts (liabilities)

Limited Partnerships

These are now rare

They have the following features

- Governed by Limited Partnership Act 1907
- Partners **can limit their liability**
- One partner must take on **full liability**
- The partners with limited liability are in effect sleeping partners
They cannot manage / bind the company nor withdraw their capital

Limited Liability Partnership

These are far more common nowadays

They have the following features:

- Register with the Registrar of companies
- Name of the partnership must end in LLP
- Governed by LLP Act 2000
- Annual accounts must be files (and audited where appropriate)
- It is a separate legal entity
- Partners liability limits are stated in the Partnership document
- The individual partners pay their own tax
The partnership does NOT pay corporation tax



Discuss The Formation Of A Partnership

Partnership Agreements are made

However, any aspect of the partnership not covered by the agreement, is governed by the PA 1890.

Some of the Partners' main rights in this act are:

- 1 To share profits equally
- 2 To be indemnified by the firm for any liabilities
- 3 To take part in the management of the business
- 4 To have access to the firm's books
- 5 To prevent admission of a new partner

Where a business relationship meets the definition of a partnership - this agreement applies - unless there's another agreement made

Explain The Authority Of Partners

Duty of Partners

Primarily they have to act in good faith to each other - a fiduciary relationship

However there are some statutory duties too:

- 1) To disclose all info they have to other partners
- 2) Account to all partners for any benefits they gain from the partnership
- 3) Not to compete against the Partnership

The Authority of Partners

Remember Partners are agents of the Partnership

and so have Actual Implied Authority

What this means is that the Partner has authority to bind the partnership in the following situations:

- The partner has actual express authority (obviously)
- It's a transaction for the Partnership
- It's a transaction where the Partner usually has authority
- The partner does NOT have authority, but the 3rd party isn't aware of it
- The Partner does not have authority as he's not even a partner! However the 3rd party are unaware of this

Apart from those situations - if the Partner gets into a deal with no authority to do so he may be sued

However remember that in partnerships all partners are JOINT and severally liable - meaning you're all liable for the partnership debts

Analyse The Liability Of Various Partners For Partnership Debts

You're only liable while you're actually a partner

So make sure you tell everyone when you leave (or advertise your departure in the London Gazette)

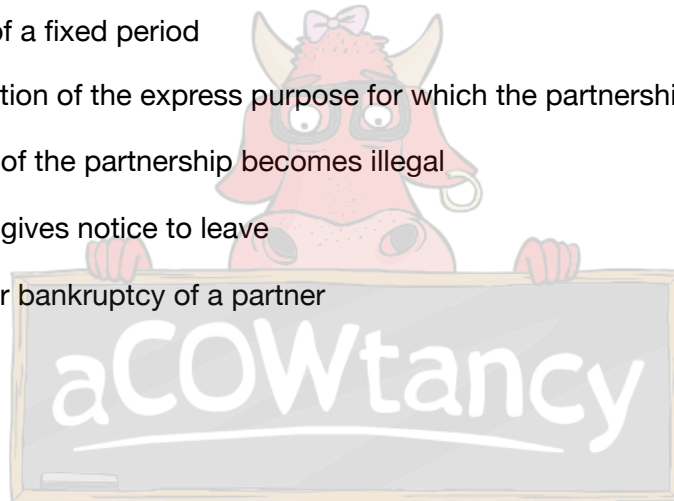
If you don't then you may still be liable for partnership debts after you leave



Explain The Termination Of A Partnership

Standard partnerships can be terminated in the following ways

- 1 Expiry of a fixed period
- 2 Completion of the express purpose for which the partnership was formed
- 3 Activity of the partnership becomes illegal
- 4 Partner gives notice to leave
- 5 Death or bankruptcy of a partner



Syllabus D3. Corporations And Legal Personality

Syllabus D3a) Distinguish between sole traders, partnerships and companies.

Distinguish Between Sole Traders, Partnerships And Companies

Sole Traders

These own and run their own business

The sole trader is the person behind it. It is not a separate legal identity

Partnerships

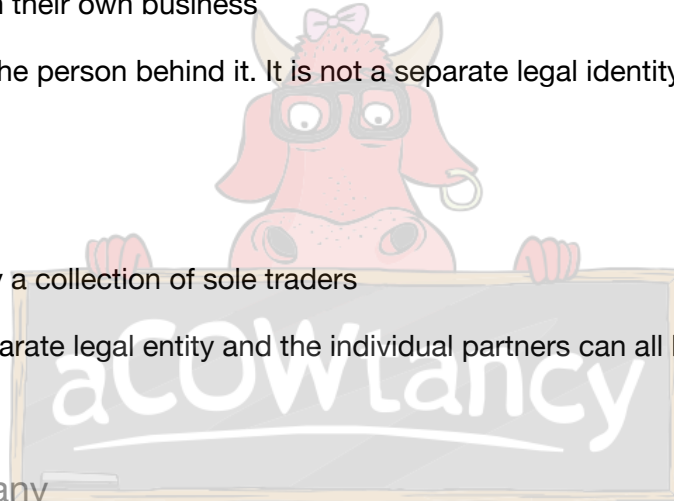
These are basically a collection of sole traders

So again not a separate legal entity and the individual partners can all be sued

Limited Company

Here the company IS a separate legal entity from its owners

The owner is liable only to amount agreed



Explain The Meaning And Effect Of Limited Liability

Limited Liability limits the liability of the owners

The idea that a company is separate legal personality from its owners comes from the case of *Salomon v Salomon & Co*

The members of a company are separated from the company itself by the '**veil of incorporation**'

This veil gives the owners protection from being sued etc - the company itself would be sued

A company can be limited by shares or by guarantee

- 1 **By Shares** The member is liable only to the amount of the original share purchase (including any outstanding amounts)
- 2 **By Guarantee** The member is limited here to the amount guaranteed to pay in a winding up of the company

Therefore creditors cannot demand company debt payments from members

Analyse Different Types Of Companies

Unlimited companies

These have separate legal personality

However the members do NOT have limited liability

Instead they do not have to file their accounts or make their accounts public

Companies limited by guarantee

Here the members have their liability limited to an agreed amount

Charities and Educational establishments often use this, allowing them to drop 'Ltd' from their name

Private Limited companies

These (most common) companies limit members' liability to amounts unpaid on their share capital.

Public Limited companies

These are similar to private limited companies except their shares may be advertised to the general public.

A stock market listing may be applied for, but not all plc's are listed on a stock market.

Differences between a LTD and a PLC

Feature	Private LTD company	PLC
Minimum number of directors	1	2
Minimum number of members	1	1
Minimum share capital	1 share	£50,000
Time to hold accounting records	3 years	6 years
AGM	Optional	Compulsory
Company Secretary	Optional	Compulsory
File accounts after year-end	9 months	6 months



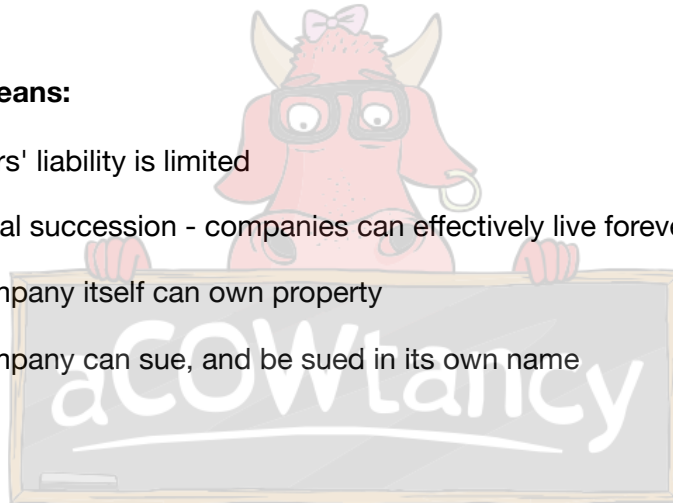
Illustrate The Effect Of Separate A) Personality And The Veil Of Incorporation

The Veil of Incorporation

The case of *Salomon v Salomon & Co* established that the members of a company were separate legal persons to the company itself, separated by the 'veil of incorporation'

This effectively means:

- 1 Members' liability is limited
- 2 Perpetual succession - companies can effectively live forever
- 3 The company itself can own property
- 4 The company can sue, and be sued in its own name



Recognise Instances Where The Veil Of Incorporation Is Lifted

Lifting the Veil

Both common law and statute allow the veil to be lifted

What does this mean?

The members or directors of a company can then be held personally liable for the debts of the company.

Common law situations to lift the veil

- 1 Where a company is being used to evade legal duties of the member *Gilford Motor Co v Horne*
- 2 To recognise the alien enemy character of a company *Daimler Co Ltd v Continental Tyre and Rubber Co (GB) Ltd*
Here the veil is lifted to see if the members of the company are from a country we are at war with
- 3 To identify the controlling mind of a company in cases of corporate manslaughter *R v Oll Ltd*
Here - a company may have killed someone negligently - if the negligence is down to one of the members of the company - then the veil may be lifted
- 4 The company is actually a partnership (a quasi-partnership) - hence the veil can be lifted as partners can be sued personally – *Ebrahimi v Westbourne Galleries*
- 5 Lifting the veil as a group of companies may be so inter-related that they're one single entity. So sue 1 sub and you sue the rest of the group companies too. *DHN v Tower Hamlets*

Statutory reasons to lift the veil

- 1 Failing to have correct trading certificates
- 2 **Fraudulent trading** – continuing to trade a company with intent to defraud creditors, or any other fraudulent purpose
- 3 **Wrongful trading** – continuing to trade an insolvent company without taking all reasonable steps to minimise the potential losses to creditors



Syllabus D4. The Formation And Constitution Of A Company

Syllabus D4a) Explain the role and duties of company promoters, and the breach of those duties and remedies available to the company.

Syllabus D4b) Explain the meaning of, and the rules relating to, pre-incorporation contracts.

Explain The Role And Duties Of Company Promoters and Pre-Incorporation contracts

A promoter is anyone who has involvement in the formation of a company

They are the first agents of a company, and hence powerful at that stage

(They don't include people like accountants who are just acting in their professional capacity)

Duties of a Promoter

This is to curb their power

- 1 General duty to exercise reasonable skill and care
- 2 Duty to disclose and account to the company
- 3 Avoid a conflict of interest with the company
- 4 Not to make a secret profit

If the Promoter breaches these duties

The company can:

- 1) Rescind any contracts they made
- 2) Recover any monies lost from the promoter

Erlanger v New Sombrero Phosphate Co

Now let's look at some of the things a Promoter has to deal with:

Pre-incorporation Expenses

In order to be re-imbursed for these - it has to be expressly agreed with the subsequent directors of the company.

Or there could be an article that indemnifies the promoter.

Pre-incorporation Contracts

These are contracts the promoter signed on behalf of the company, before the date on the certificate of incorporation

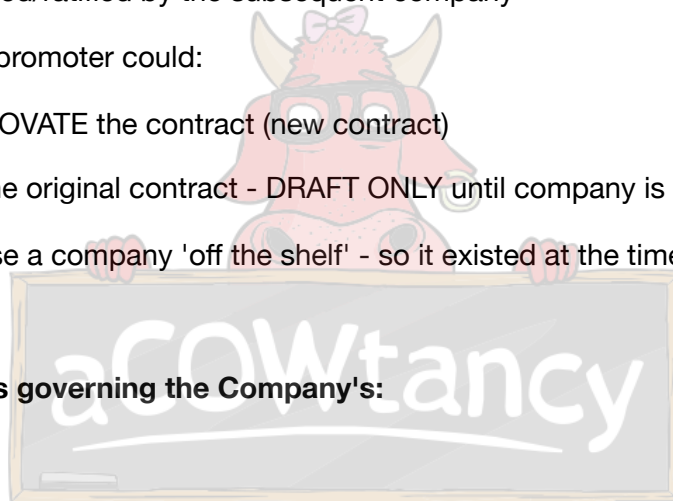
The basic rule is that these are contracts for the promoter NOT the company. These contracts CANNOT be adopted/ratified by the subsequent company

To avoid this - the promoter could:

- 1 Try to NOVATE the contract (new contract)
- 2 Make the original contract - DRAFT ONLY until company is formed
- 3 Purchase a company 'off the shelf' - so it existed at the time of the contract

Consider the rules governing the Company's:

- Objects
- Names
- Registered Office



Syllabus D4c) Describe the procedure for registering companies, both public and private, b) including the system of streamlined company registration.

Describe The Procedure For Registering Companies

A company is formed when it is issued with a Certificate of Incorporation from Registrar: The following documents must go to the Registrar of Companies House first:

Document	Description
Memorandum of Association	Historic record of initial subscribers
Application for registration	Name, address, members' liability & company type
Section 9 documents	Share capital and initial shareholdings
Statement of compliance	Statutory declaration of compliance
£20	Registration Fee



In order to form a plc there's more needed - A Trading Certificate - which needs:

to apply for a trading certificate which requires submission of the following evidence:

- Allotted share capital is at least £50,000
- £12,500 of which must be paid up
- Details of promoters expenses
- A statement of compliance regarding payment of nominal values and share premium

What if a PLC trades without the necessary documentation?

The transactions are still valid however

The company and its directors are punishable by a fine

After 12 months the company may be compulsorily wound-up and the veil of incorporation lifted.

"Off-The-Shelf" Companies

Here enterprises register a stock of companies and make them ready for sale

This enterprise will be the first secretary and director - however on sale - the registrar is informed of their resignation

So with no need for all the registration docs - its much easier



Syllabus D4d) Describe the statutory books, records and returns, including the confirmation statement and the register of people with significant control, that companies must keep or make.

Describe The Records That Companies Must Keep

The following registers must be kept by the company

Register of members

Register of people with significant control (PSC)

Records of directors (and secretaries)

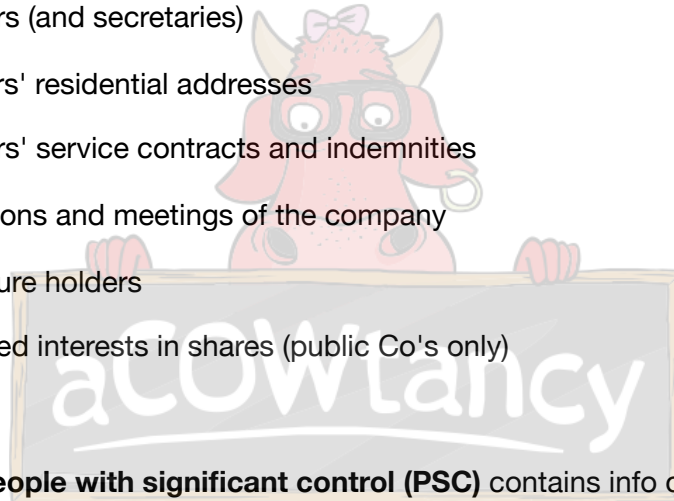
Register of directors' residential addresses

Records of directors' service contracts and indemnities

Records of resolutions and meetings of the company

Register of debenture holders

Register of disclosed interests in shares (public Co's only)



The **Register of people with significant control (PSC)** contains info on individuals who:

- 1) Own / control 25%+ of the voting rights or who exercise
- 2) Exercise control in other ways (eg ability to remove directors)

The info is name, DoB, nationality, address and details of their interest in the company

It is available for public inspection and is updated each year in the Confirmation Statement (see below)

A company must submit the following annually to the Registrar:

1 **Accounts** within 6 (PLC) or 9 (LTD) months of year end

2 **An annual confirmation statement**

This keeps the registrar informed about changes to the company such as changes to:

Membership

Share capital (number and type)

Registered office address

Principal Business Activity

Changes to the Register of PSC (above)

Directors and Secretary



Syllabus D4e) Analyse the effect of a company's constitutional documents.

Syllabus D4f) Describe the contents of model articles of association.

Analyse The Effect Of A Company's Constitutional Documents And Describe The Contents Of Model Articles Of Association

A company's constitution is its Articles of Association and any resolutions / agreements made

The Articles of Association (AoA) are the main element of a company's constitution

They are the rules which govern a company's internal affairs.

Companies can make any rules about their internal affairs as long as they are in line with:

- the general law,
- the specific provisions of the Companies Act 2006.

The AoA is a statutory contract between the company and its members and between each of the members in their capacity as members

All registered companies must have AoA (in a single document with consecutively numbered paragraphs)

The Articles provide the rules by which a company is run, covering:

- Directors' powers, responsibilities and Appointment
- Organisation and conduct of general meetings
- Issue and transference of shares and dividends
- Exercise of members' rights

Resolutions are decisions made by members which directly affect the company's constitution

Explain How Articles Of Association Can Be Changed

There is a published model AoA for the various types of company forms

These 'default' model articles exist for the different types of company.

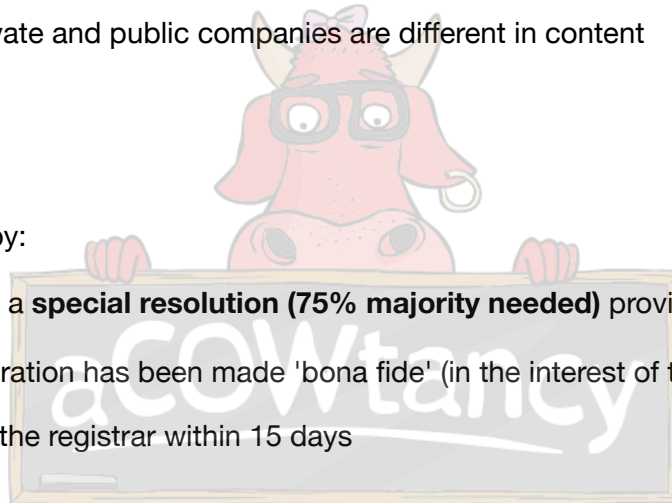
Such model articles apply to companies where they have not registered any articles of their own

The articles for private and public companies are different in content

Altering the AoA

This can be done by:

- 1 Passing a **special resolution (75% majority needed)** providing that
- 2 The alteration has been made 'bona fide' (in the interest of the company) and
- 3 Sent to the registrar within 15 days



Best Interests of the Company Test

This test is subjective and objective:

Subjective

Those deciding must actually believe they are acting in the interest of the company.

Objective

Any alteration has to be in the interest of the 'individual hypothetical member'

Eg. An alteration that allows the 98% majority to buy out the 2% minority shareholders is invalid as not being in the interest of the company as a whole.

Eg 2, An alteration that allows directors to force a shareholder who is in competition with the company, to sell their shares

Changing the AoA to expel a member?

- 1 Member is defrauding the company
- 2 Member is competing against the company

Entrenchment

Companies can 'entrench' provisions in their articles

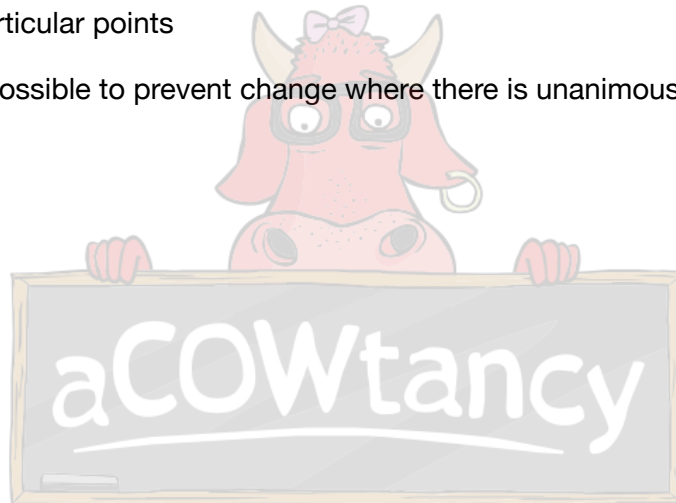
This means certain things can only be changed by means that are more restrictive than a special resolution.

Eg. The agreement of all the members before it can be altered

(However, you cannot say that the articles can never be amended)

Be careful though, the articles can give a member such voting power to block a resolution to alter articles on particular points

However it is not possible to prevent change where there is unanimous agreement in favour of change.



Explain The Controls Over The Names That Companies May Or May Not Use

The Name of the company must end in the words 'Limited' or 'public limited company'

However, the Registrar may refuse some names because:

- 1 The name is already in existence
- 2 Its use would constitute a criminal offence
- 3 It's offensive
- 4 The permission of the Secretary of State is needed (words such as king, royal)

Other Issues over Name

- It must be disclosed outside all places of business and on all business documents
- It can be changed by special resolution
- The Companies Name Adjudicator will hear appeals from individuals and companies over similar names

Syllabus E: Capital And The Financing Of Companies

Syllabus E1. Share Capital

Syllabus E1 a) Examine the different types of capital.

Examine The Different Types Of Capital

4 Different Types of Capital

- 
- 1 **Issued/allotted Capital**
The nominal value of shares currently issued
 - 2 **Called up Capital**
The money the company has asked for re: shares issued
 - 3 **Paid up Capital**
The money the company has received for re: shares issued
 - 4 **Reserve Capital**
Capital only called up on liquidation

Nominal value is the face value (not market value) of the shares

When shares are issued they may be issued at more than the nominal value - we call this the share premium

So shares can be issued partly or fully paid, however the unpaid can be called up at any time

When a plc issues shares:

- 1 25% + of the Nominal Value must be received
- 2 100% of the Share Premium must be received

Different Classes of Shares

There are 4 types of shares

1 **Ordinary shares**

These shares come with...

Voting rights

Variable Dividends receivable

Can attend general meetings

Get paid out last on Liquidation

Get paid out the capital they put in plus their share of any surplus assets leftover

2 **Preference shares**

These shares come with...

Normally no Voting rights

Fixed Dividends receivable

Restricted attendance at general meetings

Get paid out before ordinary shareholders on Liquidation (hence their name)

Only get paid out the capital they put in

3 **Redeemable shares**

These shares can be bought back by the company - although there must always be some irredeemable shares in issue

4 **Deferred shares**

These shares only receive a dividend when the ordinary shareholders have received their fixed return

Treasury Shares

These are the shares which the company have bought back from shareholders

So they reduce the number of shares on the open market.

All companies have an authorised amount of shares that it can issue legally

Class Rights

A company may have different classes of the same types of share.

Eg. Ordinary A, Ordinary B, Ordinary C etc.

They do this as each different class will have different rights we call these Class Rights

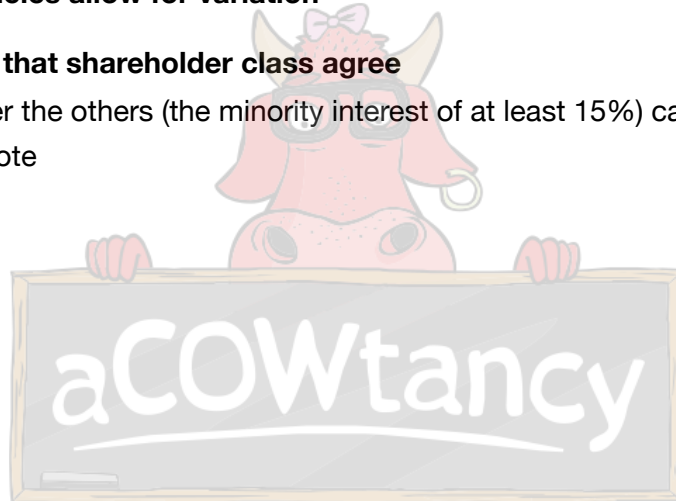
These class rights might include things like:

- Voting Powers
- Who gets paid the dividend first

Changing the Class Rights

Yes this can be done if:

- **The articles allow for variation**
- **75% of that shareholder class agree**
However the others (the minority interest of at least 15%) can object within 21 days of the vote



Explain Allotment Of Shares

Allotment is the giving of shares to someone - who then becomes a member

Private Companies (with one class of share)

You basically apply to the directors to allot you some shares

Public Companies (and Private companies with more than 1 class of share)

Here director's can't allot shares without members' authority. If they do they then can be fined - but share issue is still valid!

Pre-Emption Rights

Basically any new shares to be issued must be offered also to current shareholders according to the percentage they own - it results in a rights issue of shares

Rights Issue

This offer to existing shareholders must be made in writing (same form as general meeting notice) and be available for a period of not less than 21 days

A PRIVATE company may exclude these pre-emption rights by special resolution

Bonus Issue

This is an issue of shares for FREE to existing shareholders (according to their percentages)

So the credit goes to Share Capital (at nominal value) and the debit goes to share premium (if there is one)

This debit reduces share premium (or other reserves)

Therefore a bonus issue is often called 'a capitalisation of reserves'

It is also called a 'scrip issue'

Issuing Shares At A Discount Or A Premium

Shares must not be allotted at less than nominal value (higher is fine)

However if they are issued at a discount to their nominal value then the nominal value must eventually be paid

So, there's no requirement to immediately pay the full value of the shares.

The part of the nominal value actually paid is called the paid up capital.

A resolution can be passed saying any unpaid capital won't be called up. However, the unpaid element can still be called up if the company cannot pay its debts

Issuing shares at a Premium

Lets say you issue 100 (£1 nominal value shares) for £120

So share capital is increased ALWAYS at nominal value - in this case £100

The extra £20 goes to share premium

Literally a premium paid above the nominal value

NB. The share premium cannot be used to distribute a dividend from

Uses of the Share Premium Account

- The Debit in a bonus issue (Dr Share Premium Cr Share Capital)
- The expenses in a share issue may come from the share premium
- The expenses, commission or discount incurred in any issue of debentures may come from the share premium
- To pay for the premium payable on redemption of debentures.
- Preliminary expenses of the company may come from the share premium

Syllabus E2. Loan Capital

Syllabus E2a) Define companies' borrowing powers.

Define Companies' Borrowing Powers

Companies have an implied power to borrow for business purposes

Directors, can borrow on behalf of the company up a maximum limit (agreed by directors)



Syllabus E2b) Explain the meaning of loan capital and debenture.

Syllabus E2c) Distinguish loan capital from share capital, and explain the different rights held by shareholders and debenture holders.

Explain The Meaning Of Loan Capital And Debenture

Debentures are a form of loan capital - 'a written acknowledgement of indebtedness'.

Debentures may be issued in a number of ways:

(They maybe redeemable or irredeemable)

- 1 **Single debentures**
Issued to a single provider
- 2 **Issued in series**
Issued to several providers (all rank equally - pari passu)
- 3 **Debenture stock**
Issued to the public, each person owns a proportion of the debt via a certificate

Differences between Shares & Debentures

Feature	Shares	Debentures
Status	Member	Creditor
Return	Dividends – Variable	Interest - Fixed
Issued	NEVER at a discount	Discounted/Par/Premium
Security	None needed	Fixed/Floating charges
Liquidation Rank	Last	First

So debentures get paid out before any shares (preference or ordinary)

Unlike shares they may be issued at a discount

Interest on them may be paid from capital

They are freely transferable



Syllabus E2d) Explain the concept of a company charge and distinguish between fixed and floating charges.

Syllabus E2e) Describe the need and the procedure for registering company charges.

Explain The Concept Of A Company Charge

Charges

If a company is being wound up, the creditor with a debt secured by a charge will receive any payment before unsecured creditors and shareholders.

There are two types of charges available to debenture holders:

Fixed Charges

- Attach to specific assets
- The charged asset may not be disposed of
- If the company defaults on the loan - the charge holder sells the asset and recover his / her money owed
- On liquidation fixed charge holders get paid first

Floating Charges

- They 'hovering' over classes of assets - not attached to specific ones
- The charge attaches to class assets when:
 - A company can't pay its debts
 - A receiver gets appointed
 - A company stops business
 - A company goes into liquidation
- The company can deal in charged assets before such events
- The floating charge ranks behind fixed charge holders

Registering Charges

Must be registered within 21 days but are effective from date of creation – not registration.

Fixed charges always rank above floating charges.

So - a fixed charge created beats a floating charge created earlier

However a floating charge holder can create a Negative Pledge Clause (NPC) - which prevents a later dated fixed charge beating them. There must be some consideration paid for it and all subsequent charge holders are informed of the NPC

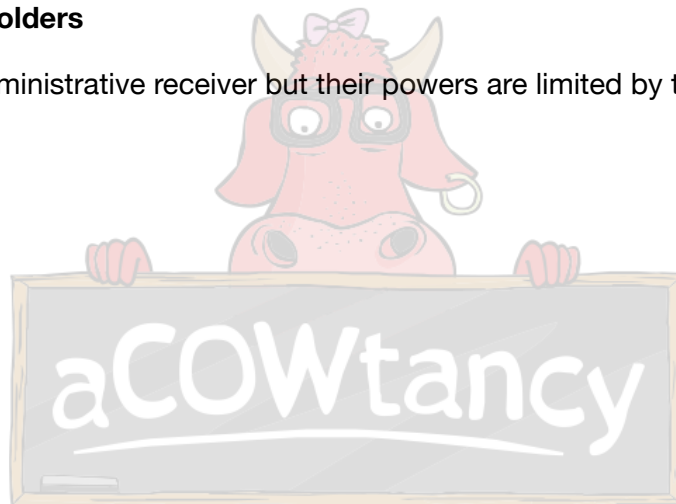
Any money owed to charge holders (after selling charged assets) becomes unsecured. So...

Fixed charge holders

Can appoint a Receiver to take control of the charged asset.

Floating charge holders

Can appoint an administrative receiver but their powers are limited by the Enterprise Act 2003.



Syllabus E3. Capital Maintenance And Dividend Law

Syllabus E3a) Explain the doctrine of capital maintenance and capital reduction.

Explain The Doctrine Of Capital Maintenance And Capital Reduction

Capital Maintenance prevents members withdrawing their capital without restriction

The idea is that there's always some money to help pay creditors - what we call the creditors' buffer.

The creditors' buffer

This is basically undistributable reserves - meaning an amount that can't be taken by shareholders via dividends or share repurchases.

Capital Reduction

Capital can be reduced in 3 ways:

- Writing off unpaid calls on issued share capital
- Removing excess capital - by giving it to fully paid shareholders
- Cancelling paid up share capital that has been lost

How to reduce capital

Per the CA 2006 private companies may reduce capital without court approval by following the procedures below:

- 1 Pass a special resolution
- 2 Produce a statement of solvency within 15 days

Public companies must get court approval for any reduction of capital and allows any member or creditor to object.

Explain The Rules Governing The Distribution Of Dividends

Private Companies

These can issue dividends out of accumulated realised profits

Public Companies

These can issue dividends out of accumulated realised profits less accumulated Unrealised losses

So, a private company may only pay dividends out of its retained earnings as a dividend

A public company must further deduct things like negative revaluation reserves.

Unlawful Distributions

- If directors authorised knowingly an unlawful dividend they will be liable personally.
- If a shareholder knew it was an unlawful dividend - they are liable to pay it back
- If the company's auditors advised the unlawful dividend policy - they are liable for professional negligence.

Syllabus F: Management, Administration And The Regulation Of Companies

Syllabus F1. Company Directors

Syllabus F1a) Explain the role of directors in the operation of a company, and the different types of directors, such as executive/ non-executive directors or de jure and de facto directors, and shadow directors.

Explain The Role Of Directors

Directors are responsible for day to day management

Notice though they are not necessarily the owners

Types Of Directors

Company directors must be at least 16 years old

And at least one director must be a natural person.

- 1 **Executive** – A board member, managing the business
- 2 **Non-executive** – A part time board member, no managing of the business
- 3 **Managing director** – Has the implied actual authority to contract on behalf of the company
- 4 **Shadow director** – Someone who the board is used to following (not professional advisors though) - this even includes disqualified directors
- 5 **Alternate director** – A person who acts in place of another director
- 6 **De facto director** – Anyone who's NOT formally appointed but carries out all the duties of and makes decisions as a director
- 7 **De jure director** – Anyone who IS formally appointed and registered as a director

Appointment, Losing Office And Disqualification Of Directors

Appointment

No formal qualifications needed

Limited number of ways in which directors can be appointed:

- 1 Signing Section 9 documents when registering a new company
- 2 Appointed at an Annual General Meeting (AGM) - by ordinary resolution
- 3 Casual vacancy - appointed by the board

Removal

Directors can be removed in the following ways:

- 1 **Removal** – by ordinary resolution, with special notice (28 days)
- 2 **Resignation** – in writing
- 3 **Retirement** – not standing for re-election
- 4 **Termination per the articles**– failure to comply with articles eg. not participating in majority decisions
- 5 **Disqualification** – by the Company Directors Disqualification Act 1986 (CDDA 86) - see below

Disqualification

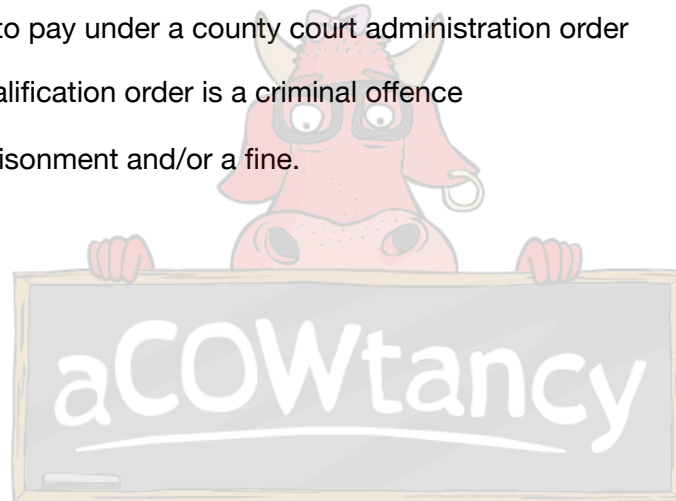
Courts can disqualify anyone from being a director for between 2-15 years.

There are 3 categories of disqualification:

- 1 **General misconduct** in running a company:
 - Conviction for an indictable offence to do with running a company
 - Persistent breaches of company legislation
 - Fraud during winding up
- 2 **Disqualification for unfitness**
 - Declared by a court after a company insolvency
 - After an investigation of the company
- 3 **Other cases**
 - Fraudulent or wrongful trading
 - Undischarged bankrupts acting as directors
 - Failure to pay under a county court administration order

Breaching a disqualification order is a criminal offence

Up to 2 years imprisonment and/or a fine.



Powers of Directors

The Board of Directors may exercise 'all the powers of the company' though this power is given to the board, not individual directors.

Individual directors can only bind the company if they have:

- 1 **Express actual authority** – from their contract, the articles, or the board
- 2 **Implied actual authority** – from their position
- 3 **Apparent authority** – where the director holds themselves out Freeman and Lockyer v Buckhurst Park Properties



Duty of Directors

There are 6 General Duties of Directors

There are 6 General Duties of Directors

as per Companies Act

- 1 **To act per Company's constitution**
and for proper purpose
- 2 **To Promote the success of the company**
For the benefit of its members as a whole; considering:
 - (a) The likely long term consequences
 - (b) The interests of employees,
 - (c) Business relationships with suppliers, customers and others,
 - (d) The impact on community and the environment,
 - (e) The reputation for high standards
 - (f) Acting fairly between members of the company.
- 3 **To show Independent judgment**
Cannot delegate:
 - (a) Directors decisions
 - (b) Appointing or terminating a director
 - (c) Declaring a dividend
- 4 **To show Reasonable skill, Care and Diligence**
This is judged by:
"Has she exercised the knowledge, skill and experience reasonably expected of a director in that position (and of her in particular)"
So basically to act as a reasonable person would, and if you have a particular skill or experience - then exercise those too!

5 **To Avoid Conflicts of Interest**

Directors have a fiduciary duty not to benefit personally from any company contracts.

However independent directors may now authorise such transactions unless the AofA prohibits such authorisation.

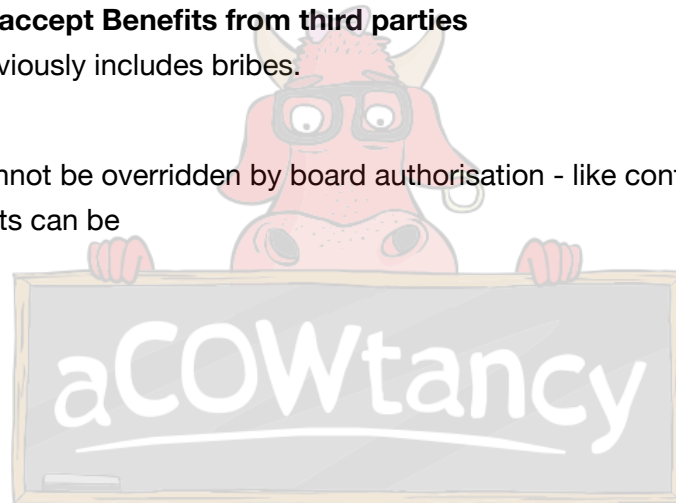
For PLCs such authorisation by independent directors must be expressly permitted by the AofA.

So Directors must disclose their interests in such contracts at the first board meeting possible - if not the contract will be voidable by the company and the director liable for her profits made and a possible fine

6 **To Not accept Benefits from third parties**

This obviously includes bribes.

This cannot be overridden by board authorisation - like conflicts of interest contracts can be



Directors' Specific Duties

Substantial Property Transactions

If a director wants property of the company - she needs approval within the following limits:

- (a) the lower of – £100,000 or 10% of net assets
- (b) there is a de minimis value of £5,000

Loans and quasi loans

Private Companies

Loans to directors fine - subject to member approval.

Public Companies

Also need member approval for loans and quasi loans to directors.

In respect of all types of companies the following loans may be made without member approval:

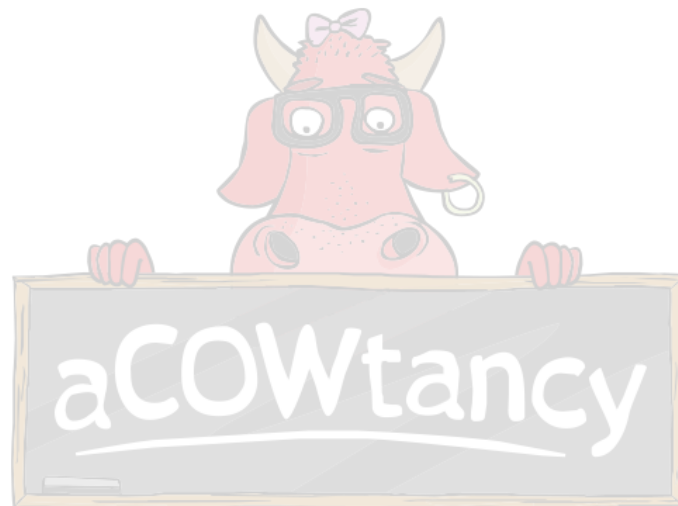
- 1 loans up to £10,000
- 2 loans up to £50,000 (If assists directors in their duties)
- 3 loans and quasi loans made by a money lending business in the ordinary course of business

Service Contracts

All directors' service contracts copies must be kept - for at least one year after they have expired.

Consequences of a breach of duty

- 1 **Fined** – failure to comply can be a criminal offence
- 2 **Removed from office** – for breach of their service contract
- 3 **Indemnify the company**– for any losses suffered as a result of breach of duty



Syllabus F2. Other Company Officers

Syllabus F2a) Discuss the appointment procedure relating to, and the duties and powers of, a company secretary.


Company Secretary

Private Companies

The Company Secretary duties can be performed by any director of the company, or any person they delegate those duties to

Public companies must still appoint a company secretary

They must be qualified by being any of the following:

- 
- (a) Qualified accountant
 - (b) A solicitor or barrister
 - (c) Qualified chartered company secretary
 - (d) A company secretary before 22nd December 1980
 - (e) A company secretary of a plc for 3 of the last 5 years
 - (f) Anyone else deemed fit to hold the post by virtue of any other position held

Duties of the Company Secretary include:

The actual duties of the company secretary are set by the board of directors, and as such vary. Some of the common duties undertaken by secretaries include:

- 1 Keeping the statutory registers
- 2 Submitting annual returns
- 3 Organising and attending board and general meetings
- 4 Ensuring statutory compliance
- 5 Signing Co. Act required documents

The company secretary has the power to bind the company in all transactions of an administrative nature via 'implied authority' *Panorama Developments v Fidelis Furnishing*

Auditor

No need to appoint an auditor if..

The company meets at least two of the following:

- Turnover less than £10.2 million
- Balance sheet total less than £5.1 million
- 50 or less employees

Appointment of an Auditor

Annually at the AGM by ordinary resolution

(unless AGM dispensed with - then automatically reappointed)

Duties of an auditor

- 1 Opinion on Truth and Fairness of the Financial Statements
- 2 State accounts have been properly prepared, and if directors' report is consistent with them
- 3 To make investigations to give an opinion
- 4 To report on consistency of summary financial statements circularised

Powers of the auditor

- 1 The right to access at all times, the company's books and accounts
- 2 To get all information and explanations they consider necessary
- 3 To receive copies of all proposed resolutions
- 4 To attend general meetings
- 5 To resign at any time

Syllabus F3. Company Meetings And Resolutions

Syllabus F3a) Distinguish between types of meetings: general meetings and annual general meetings.

Distinguish Between Types Of Meetings

3 Types of Meeting:

- 1 **Annual General Meeting (AGM)** – called by directors - 21 day notice needed (shorter if 100% agree)
Private companies - NOT mandatory
Public companies - within 6m of Y/E
Routine business
- 2 **General Meeting (GM)** – called by directors / members owning 5%+ - 14 days notice needed (shorter if 90% (private) / 95% (public) agree)
Non-routine business (exceptional items)
- 3 **Class Meeting (GM)** – called by that class members - on matters relating to them - 14 day notice needed

Calling Of General Meetings

Company secretary is responsible for complying with the following:

- 1 Sufficient notice given
- 2 Notices of time, location, and detail enough to allow members decide whether they need attend
- 3 Agenda circulated
- 4 Auditor invited

Distinguish Between Types Of Resolutions

Ordinary Resolutions

50% Majority needed (14 days notice)

Uses:

- 1 To allot shares
- 2 To Approve auditors liability
- 3 To Appoint/Remove directors

Special Resolutions

75% Majority needed

If passed at AGM - 21 days notice

If passed at GM - 14 days notice

Uses:

- 1 Liquidations
- 2 Change Articles
- 3 Change Name

Written Resolutions (only for Private Co.s)

Signed by members.

Used Instead of an ordinary resolution - >50% of members must consent

Used instead of a special resolution – 75% of members must consent

Removal of directors and auditors needs special notice - 28 days (so a written resolution is not effective)

The Procedure For Calling And Conducting Company Meetings

Members' Rights

- 1 **To call a GM** – requiring 5% of share capital
Then the directors must call a meeting within 21 days
The meeting must then be held within 28 days of that call
- 2 **To put something on the Agenda** – needs 5%, or 100 members holding an average £100 of shares each
- 3 **To vote** – subject to their class rights

Conduct of Meetings

- 1 **Voting** Normally a show of hands
- 2 **Proxies** Appointed by any member (unable to attend) to speak and vote at meetings
- 3 **Chairman** Any member - must act bona fide
- 4 **Quorum** Minimum number present to be legal. The model articles sets at one for single member companies, and two for all others
- 5 **Minutes** Must be available for public inspection and kept for 10 years
- 6 **Special Notice** For removing a director or auditor
28 days notice required
So ordinary resolution with special notice to all of the members and the relevant director or auditor

Electronic communication

If members agree... use e-mail, notifications on the company's website for:

- 1 Notice of meetings
- 2 Members' requests for resolutions/meetings
- 3 Hosting board meetings (if directors in different locations)
- 4 Public companies must display the results of polls on their website
- 5 Members consenting to a written resolution



Syllabus G: Insolvency Law

Syllabus G1. Insolvency and Administration

Syllabus G1a) Explain the meaning of and procedure involved in voluntary liquidation, including members' and creditors' voluntary liquidation.

Syllabus G1b) Explain the meaning of, the grounds for, and the procedure involved in compulsory liquidation.

Syllabus G1c) Explain the order in which company debts will be paid off on liquidation.

Explain Liquidation

Liquidation

There are three ways to end a company:

Members' voluntary liquidation

Creditors' voluntary liquidation

Compulsory liquidation

1 **Members' voluntary liquidation**

Started by Directors (when they think the company is solvent)

Procedure:

- (a) Special resolution
- (b) Appoint liquidator
- (c) Statutory declaration of solvency (15 days to get to registrar)
- (d) Liquidator's report (within three months) on his transactions
- (e) Liquidators final accounts

As the company is solvent, creditors have no involvement (can attend meetings)

2 **Creditors' voluntary liquidation**

Started by Creditors (when they think the company is insolvent)

Procedure:

- (a) Special resolution (Liquidation starts here)
- (b) Statement of Affairs back to Creditors within 7 days
- (c) Members meeting - Appoint a liquidator
- (d) Creditors meeting - Members send notice to Creditors for their consent and decision
- (e) Liquidator's report on his transactions

3 **Compulsory liquidation**


Called normally when a company cannot pay its debts.

Any creditor of at least £750, not paid in 21 days, can ask the courts for a compulsory winding up:

- (a) The Official Receiver is appointed by the courts
- (b) Liquidation starts from the petition date
- (c) A statement of the company's affairs produced
- (d) Members and Creditors meeting - Appoint a liquidator, and form a liquidation committee
- (e) Final Creditors meeting - Liquidator presents his accounts

The Liquidator realises the assets and distributes to the creditors. Any surplus to the persons entitled to it

The Order Of Payment

- 
- 1 Secured creditors with fixed charges
 - 2 Liquidator's expenses
 - 3 Preferential creditors – all ranking equally
 - 4 Secured creditors with floating charges
 - 5 Ordinary unsecured creditors
 - 6 Deferred debts – such as dividends declared, not paid
 - 7 Members' capital
 - 8 Any surplus is returned to members in line with the Articles

Also a company will be wound up where it is 'just and equitable':

- (a) Deadlock in management – Yenidje Tobacco Co Ltd
- (b) Breakdown in a quasi-partnership relationship – Re Westbourne Galleries
- (c) Failure of substratum – Re German Date Coffee Co Ltd

Syllabus G1d) Explain administration as a general alternative to liquidation.

Syllabus G1e) Explain the way in which of an administrator may be appointed, the effects of such appointment, and the powers and duties an administrator.

Explain Administration

Administration is an alternative to liquidation

What's the point of Administration?

To save the company from liquidation - keep it as a going concern

Get a better result for creditors - than just winding up

Or - if in best interests of creditors..

To realise the assets and make distributions to creditors

How?

Replacing the directors (if they wish)

How long for?

Up to 12 months, or until the administrator feels they can resign

What powers have they got?

Run the company as they see fit

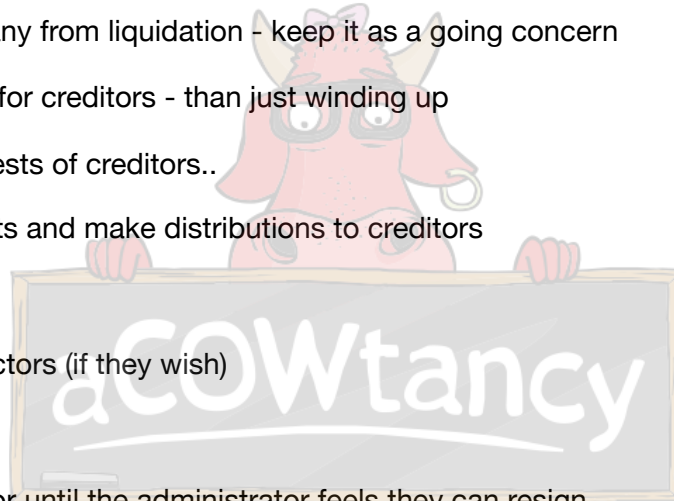
Appoint/remove Directors

Pay monies to secured/preferential creditors (without court approval)

Pay monies to unsecured creditors (with court approval)

Take custody of all company property

Dispose of company property



Administration Orders

Brought by Directors or Creditors - if granted by the courts:

- 1 Winding up petitions are dismissed
- 2 Assets cannot be reclaimed by secured charge holders
- 3 Assets held under hire purchase agreements cannot be re-possessed



Syllabus H: Corporate Fraudulent and Criminal Behaviour

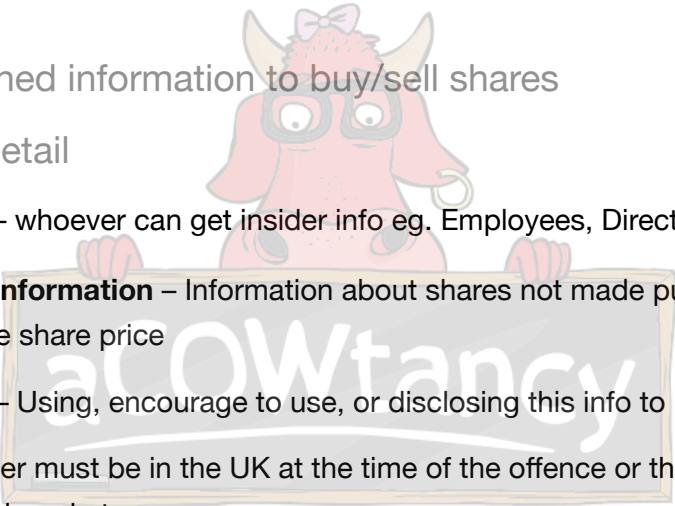
Syllabus H1. Fraudulent and Criminal Behaviour

Syllabus H1a) Recognise the nature and legal control over insider dealing.

Insider Dealing

Using UNpublished information to buy/sell shares

Terms in more detail

- 
- 1 **Insider** – whoever can get insider info eg. Employees, Directors etc
 - 2 **Insider Information** – Information about shares not made public which would affect the share price
 - 3 **Dealing**– Using, encourage to use, or disclosing this info to buy shares
 - 4 The dealer must be in the UK at the time of the offence or the market must be a UK regulated market.

NOT Insider Dealing if:

- 1 Acted in good faith
- 2 Didn't expect the dealing to result in profit
- 3 Reasonably thought the info was already public
- 4 Would have dealt even without the info

Legal Effect

The prosecution to prove 'guilty beyond reasonable doubt'

Maximum sentence is 7 years in prison, and an unlimited fine.

Market Abuse

A range of offences (including insider dealing)

Examples include:

- Manipulate transactions to artificially inflate a share price
- Give out untrue or misleading information
- Behave so as to distort the market in a particular investment



Money Laundering

Giving appearance that Criminal proceeds come from legal source

How to do it!

- 1 **Placement** – Put the proceeds into a legal business activity
- 2 **Layering** – Transfer the money from place to place, concealing its criminal origins
- 3 **Integration** – Buying legitimate assets etc

Categories Of Offence

- 1 **Laundering** – being the offences of concealing, disguising, converting, transferring, or removing criminal property from the UK
- 2 **Failure to report** – if you suspect someone is money laundering and don't report it
- you've committed an offence (if working in a regulated industry, ie accountants)
- 3 **Tipping off** – warning someone that they are being investigated for money laundering

Penalties

- 1 **Laundering** – Max 14 years prison, and/or a fine.
- 2 **Failure to report** – Max five years prison, and/or a fine
- 3 **Tipping off** – Max two years prison, and/or a fine

Bribery

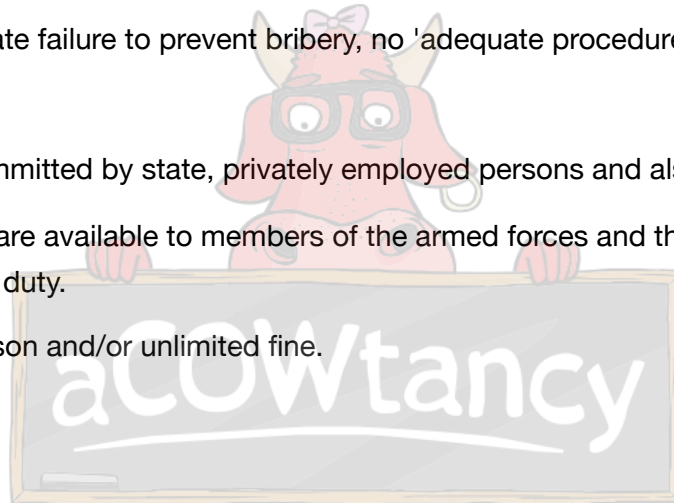
4 classes of offence

- 1 Bribing someone
- 2 Receiving a bribe
- 3 Bribing a foreign public official
- 4 Corporate failure to prevent bribery, no 'adequate procedures' to prevent it

Bribery can be committed by state, privately employed persons and also outside of the UK.

Specific defences are available to members of the armed forces and the secret services when engaged on active duty.

Max - 10 years prison and/or unlimited fine.



Criminal Activity in Companies

4 classes of offence

Companies have been prosecuted for manslaughter, fraud, and breaches of eg health and safety laws.

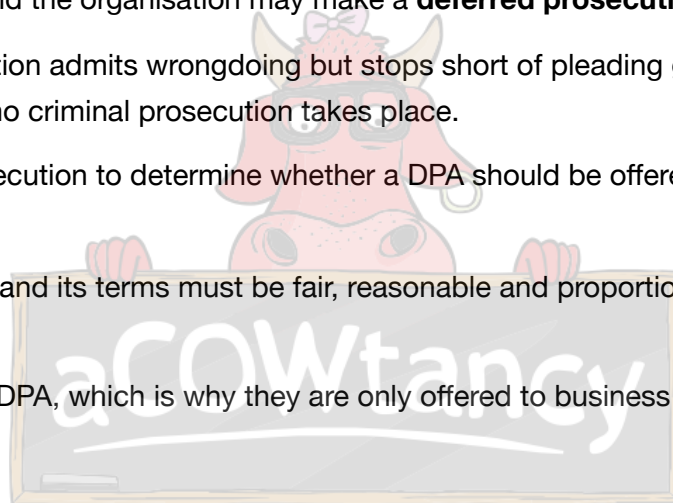
The prosecution and the organisation may make a **deferred prosecution agreement (DPA)**

Here, the organisation admits wrongdoing but stops short of pleading guilty - in return, a judge awards a fine but no criminal prosecution takes place.

It is up to the prosecution to determine whether a DPA should be offered. Offering it should be in the

interests of justice and its terms must be fair, reasonable and proportionate. No individual should benefit

from the offer of a DPA, which is why they are only offered to business organisations.



Criminal offences in relation to winding up:

These include:

- 1 Declaring solvency without reasonable grounds
- 2 Fraudulent trading

Prosecutions are often brought against directors of insolvent companies for fraudulent trading and wrongful trading

The law protects creditors who may be disadvantaged by the company being liquidated.

Directors may try to deceive creditors and this is a criminal offence

Fraudulent and Wrongful trading

Fraudulent trading

Directors continue business, defrauding creditors

- 1 The directors must have acted dishonestly
- 2 The directors must have intended to make a gain for themselves

Remedies

- 1 If Criminal prosecution Max 10 years in prison and/or a fine
- 2 If Civil action (insolvent liquidation) 'make such contribution to the company's assets as the court thinks proper'

Wrongful Trading

When can't prove fraudulent trading

Directors continue business - knowing (or should have) no reasonable prospect of avoiding insolvent liquidation

Not taking reasonable steps to avoid losses for creditors

Remedy is civil - 'make such contribution to the company's assets as the court thinks proper'

